No. 90-1205 (1)

In the Supreme Court of the United States

OCTOBER TERM, 1990

UNITED STATES OF AMERICA, PETITIONER

v.

RAY MABUS, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTION PRESENTED

Whether Mississippi satisfied its obligation to dismantle its racially dual system of higher education, when state action continues to interfere on the basis of race with a qualified student applicant's choice of which school to attend.

PARTIES TO THE PROCEEDING

The petitioner, plaintiff-intervenor in this action, is the United States. The plaintiffs are Mrs. Jake Ayers, Sr., Vernon B. Ayers, William B. Ayers, Hattie James, Margaret James, Leola Blackmon, Lillie Blackmon, Shirley A. Porter, Kenneth Spearman, James T. Holloway, Dave Collins, Lewis E. Armstrong, Darryl C. Thomas, Albert Joe Williams, George Bell, Johnny Sims, Thelma H. Walker, Randolph Walker, Bennie G. Thompson, Virginia Hill, B. Leon Johnson, Pamela Gipson, Janice K. Miggins, and Floyd Alexander; and a plaintiff class consisting of all black citizens residing in Mississippi, whether students, former students, parents, employees, or taxpayers, who have been, are, or will be discriminated against on account of race in receiving equal educational opportunity and/or equal employment opportunity in the universities operated by the defendant Board of Trustees. The defendants are Ray Mabus, in his official capacity as Governor of the State of Mississippi;[1] the Board of Trustees of State Institutions of Higher Learning of the State of Mississippi; members of the Board of Trustees, in their personal and official capacities: Cass Pennington, Joe A. Haynes, Dianne Miller, Nancy McGahey Baker, Frank Crosthwait, Jr., Will A. Hickman, J. Marlin Ivey, Bryce Griffis, William M. Jones, James W. Luvene, Sidney L. Rushing, and Dianne Walton; Delta State University, and its president, F. Kent Wyatt, in his official capacity; Mississippi State University, and its president, Donald W. Zacharias, in his official capacity; Mississippi University for

[1] Pursuant to Supreme Court Rule 35.3, the current governor of Mississippi, Ray Mabus, has been substituted for William Allain, governor at the time this case was tried.

Women, and its president, Clyda S. Rent, in her official capacity; the University of Mississippi, and its chancellor, R. Gerald Turner, in his official capacity; the University of Southern Mississippi, and its president, Aubrey K. Lucas, in his official capacity; and W. Ray Cleer, in his official capacity as Commissioner of Higher Education of the State of Mississippi.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Solicitor General, on behalf of the United States of America, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.[1]

OPINIONS BELOW

The en banc opinion of the court of appeals (App., *infra*, 1a-44a) is reported at 914 F.2d 676. The panel opinion of the court of appeals (App., *infra*, 45a-103a) is reported at 893 F.2d 732. The opinion of the district court (App., *infra*, 104a-201a) is reported at 674 F. Supp. 1523.

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[1] The private plaintiffs in this case filed a petition for a writ of certiorari (No. 90-6588) on December 14, 1990.

JURISDICTION

The judgment of the court of appeals upon rehearing en banc was entered on September 28, 1990. On December 18, 1990, Justice Scalia extended the time in which to file a petition for a writ of certiorari to January 26, 1991 (a Saturday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

The Equal Protection Clause of the Fourteenth Amendment and Section 601 of Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d, are set forth in the petition appendix (App., *infra*, 202a).

STATEMENT

Prior to this Court's decision in *Brown* v. *Board of Education*, 347 U.S. 483 (1954), the State of Mississippi established a system of higher education based on de jure segregation of white and black students. Mississippi has since adopted what it submits are race-neutral policies and practices. The question in this case is whether Mississippi has satisfied its obligation under the Equal Protection Clause and Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d, to dismantle its racially dual system of higher education.

1. Mississippi manages and controls eight public universities through the Board of Trustees of State Institutions of Higher Learning, which has plenary authority over the institutions' operations. App., *infra*, 106a, 109a, 114a. At the time of this Court's decision in *Brown* until at least 1962, all eight universities were strictly segregated by race, and public higher education in Mississippi was "both separate

and unequal." App., *infra*, 114a. Five institutions—the University of Mississippi, Mississippi State University, the University of Southern Mississippi, Mississippi University for Women, and Delta State University—admitted only white students. Three institutions—Alcorn State University, Jackson State University, and Mississippi Valley State University—admitted only black students. *Id.* at 109a-115a.

The racially dual system encompassed the areas of "(1) student enrollment, (2) maintenance of branch centers by the historically white universities in close proximity to the historically black universities, (3) employment of faculty and staff, (4) provision and condition of facilities, (5) allocation of financial resources, (6) academic program offerings, and (7) racial composition of the governing board and its staff." App., *infra*, 169a; see also *id.* at 114a-115a. While the white institutions offered "a full range of program offerings" at the undergraduate, graduate, and professional levels, the educational offerings at the black institutions "were limited to teacher education, agriculture and the mechanical arts, and the practical arts and trades." *Id.* at 114a-115a & n.2.

All eight institutions remained segregated, in accordance with state law, until at least 1962, when James Meredith was admitted to the University of Mississippi under court order. App., *infra*, 116a. See *Meredith* v. *Fair*, 306 F. 2d 374 (5th Cir.), cert. denied, 371 U.S. 828, enforced, 313 F.2d 534 (5th Cir. 1962). The other four white institutions did not admit their first black students until between 1965 and 1967. The white institutions began hiring their first black faculty members between 1970 and 1975. The black institutions admitted their first white students between 1966 and 1970, and hired their first white

faculty members between 1966 and 1969. App., *infra*, 116a-117a.

2. The private petitioners, representing black citizens of Mississippi, initiated this action against respondents, the Governor and state educational officials, on January 28, 1975. Their complaint alleged that Mississippi had maintained the racially segregative effects of its historicaiiy dual system of public higher education, thereby violating the Fifth, Ninth, Thirteenth, and Fourteenth Amendments, 42 U.S.C. 1981 and 1983, and Title VI of the Civil Right Act of 1964, 42 U.S.C. 2000d *et seq.* App., *infra*, 105a-106a. Shortly thereafter, the United States intervened pursuant to 42 U.S.C. 2000h-2. The United States alleged that Mississippi's maintenance of the effects of its dual system of higher public education violated the Fourteenth Amendment and Title VI.

In 1987, after extensive discovery and unsuccessful settlement efforts, the district court held a five-week bench trial. On December 10, 1987, the district court ruled for respondents on all issues and dismissed the case. App., *infra*, 108a-109a, 201a. The district court recognized that there remained significant differences between the historically white and historically black schools as to admission standards, student and faculty composition, and funding. See, *e.g.*, App., *infra*, 127a-128a, 133a, 135a-138a, 156a-163a. The district court held, however, that respondents had satisfied their affirmative obligation to dismantle the dual system through the adoption of race-neutral policies and practices. *Id.* at 201a.

The United States and the private petitioners appealed. A divided panel of the Fifth Circuit reversed and remanded the case for remedial proceedings. App., *infra*, 45a-103a. The court of appeals ruled that this Court's decisions in *Brown* and *Green* v.

New Kent County School Board, 391 U.S. 430 (1968), which involved desegregation of compulsory elementary and secondary education systems, require respondents "to eliminate all of the 'vestiges' or effects of de jure segregation, root and branch, in a university setting." *Id.* at 72a. The court concluded that respondents had failed to meet that obligation. *Id.* at 94a. Judge Duhé dissented, relying primarily on Justice White's concurring opinion for the Court in *Bazemore* v. *Friday*, 478 U.S. 385 (1986), which held that state officials had adequately disestablished segregation of state-supported 4-H and Homemaker Clubs by allowing "voluntary choice" in attendance (*id.* at 407-408). App., *infra*, 102a-103a. Judge Duhé reasoned that because university attendance choices are "voluntarily made" (*id.* at 102a), the State's duty "to eliminate all vestiges of de jure discrimination 'root and branch' does not reach the university." *Id.* at 103a.

The court of appeals granted a suggestion for rehearing en banc and vacated the panel opinion. App., *infra*, 2a. On rehearing, a divided en banc court affirmed the district court, concluding that "Mississippi had adopted and implemented race neutral policies for operating its colleges and universities and that all students have real freedom of choice to attend the college or university they wish." *Ibid.*

The en banc court acknowledged that the State was "constitutionally required to eliminate invidious racial distinctions and dismantle its dual system." App., *infra*, 13a. In defining that duty in the higher education context, however, the court concluded that it must choose between the principles set forth in Justice White's concurring opinion for the Court in *Bazemore* and those set forth in *Green*. App., *infra*,

13a-14a, 20a. The en banc majority determined that *Bazemore*, rather than *Green*, provided the standard for desegregation of public universities (App., *infra*, 23a), stating:

> to fulfill its affirmative duty to disestablish its prior system of de jure segregation in higher education, the state of Mississippi satisfies its constitutional obligation by discontinuing prior discriminatory practices and adopting and implementing good-faith, race-neutral policies and procedures.

Id. at 26a. The court then concluded that Mississippi had satisfied that standard in this case. See *id.* at 26a-37a.

Judge Goldberg, joined by Judges Politz, King, and Johnson, dissented, endorsing the panel majority's opinion. App., *infra*, 37a-38a. Judge Higginbotham concurred in part and dissented in part. *Id.* at 38a-44a. In his view, the fact that Mississippi "has no constitutional duty to achieve any particular racial mix is not necessarily a full response to the more general question of whether it has discharged its duty to undo its wrong." *Id.* at 40a. He would have affirmed the district court's judgment that Mississippi had not engaged in intentional discrimination, but would have remanded the case for an inquiry into whether "Mississippi has discharged its duty to undo any present injury from the past." *Id.* at 38a n.*, 43a. Judges Politz and King joined in the dissenting portion of Judge Higginbotham's decision.

REASONS FOR GRANTING THE PETITION

The court of appeals' decision in this case raises important issues of national significance and is in direct conflict with decisions of the Sixth Circuit. We accordingly submit that this Court should grant the government's and the private petitioners' petitions for a writ of certiorari.

1. As the opinions below plainly indicate, there is considerable confusion over the proper legal standard against which to assess a State's obligation to disestablish a formerly de jure dual system of higher education. The resolution of that question by the court below will have a direct effect on the operation of Mississippi's eight universities and on the thousands of Mississippi citizens who are attending or wish to attend those institutions. That decision will also establish a binding legal standard for disestablishment of segregated systems of higher education in the other States within the Fifth Circuit.[2] In addition, it may affect ongoing judicial proceedings as to the status of higher education systems in other States.[3] Given the

[2] The United States' complaint in *United States* v. *Louisiana*, No. 80-3300, a similar higher education desegregation case, has been dismissed as a result of the Fifth Circuit's decision in this case. We have filed a notice of appeal from that dismissal and have asked the court of appeals to stay proceedings pending action by this Court on the government's petition.

[3] On October 29, 1990, the United States District Court for the Northern District of Alabama commenced a trial on the liability issues in *United States* v. *Alabama*, Civ. No. 83-M-1676-S (N.D. Ala.), a similar higher education desegregation case. In addition, the Department of Education's Office of Civil Rights is responsible for ensuring Title VI compliance by other States that lie within the jurisdiction of five different federal circuits.

broad impact of the decision below, this Court should grant review to determine the scope of the affirmative duty to desegregate in the higher education context.[4]

2. The Fifth Circuit's ruling in this case is in conflict with the law in the Sixth Circuit, as set forth in *Geier* v. *University of Tennessee*, 597 F.2d 1056, 1065 (1979), and *Geier* v. *Alexander*, 801 F.2d 799, 805 (1986). In the first *Geier* decision, the Sixth Circuit upheld a district court order requiring the merger of a traditionally black and a traditionally white institution located in Nashville as a part of a plan to dismantle Tennessee's dual system of higher education. The court stated that "the *Green* requirement of an affirmative duty applies to public higher education as well as to education at the elementary and secondary school levels * * *; it is only the means of

[4] This Court has not dealt with the issue before, except to affirm summarily two contradictory lower court decisions. Compare *Alabama State Teachers Ass'n* v. *Alabama Public School & College Auth.*, 289 F. Supp. 784 (M.D. Ala. 1968), aff'd per curiam, 393 U.S. 400 (1969) (*ASTA*), with *Norris* v. *State Council of Higher Educ.*, 327 F. Supp. 1368 (E.D. Va.), aff'd, 404 U.S. 907 (1971). In *ASTA*, the district court held that the scope of the affirmative duty to dismantle a dual system of higher education did not extend as far as in the elementary and secondary school context (289 F. Supp. at 787) and that, on the facts of that case, good faith, nondiscriminatory practices had satisfied the affirmative duty (*id.* at 789-790). *Norris*, on the other hand, rejected the contention that the duty defined in *ASTA* provided a "universal definition" of the scope of the duty for higher education systems (327 F. Supp. at 1372) and specifically held that higher education authorities were obligated "to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch" (*id.* at 1373, quoting *Green*). *Norris* held the duty to be "as exacting" as in the elementary and secondary context, even though the methods used to achieve the desired end must necessarily differ. *Ibid.*

eliminating segregation which differ." 597 F.2d at 1065.[5] In the second *Geier* decision, the Sixth Circuit reaffirmed that conclusion, upholding a set-aside program that gave black students preferences for admission to graduate and professional schools. 801 F.2d at 804-805.[6] The en banc majority in this case expressly disagreed "with both the holding and reasoning in *Geier*." 914 F.2d at 686.

3. We believe that the court of appeals failed to reconcile properly the principles set forth in Justice White's concurring opinion for the Court in *Bazemore* and the principles set forth in other opinions of this Court, including *Green*, that address a State's obligation to dismantle segregated systems of primary and secondary public education. The issue below was joined entirely in terms of the need to apply either the *Bazemore* or the *Green* standard. In our view,

[5] The defendants in *Geier* took a position similar to that adopted by the en banc majority in this case, arguing "that the State fulfilled its constitutional obligation to establish a unitary system when it instituted an 'open-door' admissions policy" and that "the present predominantly black enrollment at TSU ha[d] resulted from the exercise of free choice by students rather than from any current unconstitutional actions of the State." 597 F.2d at 1064. The Sixth Circuit rejected that argument, stating that "[w]here an open admissions policy neither produces the required result of desegregation nor promises realistically to do so, something further is required." *Id.* at 1067.

[6] The Sixth Circuit rejected an argument, based on this Court's decision in *Bazemore*, that the program was not justified because the defendants' obligation to dismantle the former dual system had been satisfied by the adoption of "neutral admissions standards." 801 F.2d at 804. The court of appeals distinguished *Bazemore*, on the ground that higher education was of much greater importance than membership in 4-H clubs, and restated its holding from the first *Geier* decision. *Id.* at 804-805.

however, those two approaches are by no means mutually exclusive in the context of higher education; rather, both approaches can properly inform resolution of the ultimate question—whether state action interferes on the basis of race with a qualified student applicant's choice of which state school to attend. Here, the actions of Mississippi taken after abolition of its de jure dual system—in particular, continuation of a racially-biased admissions process and perpetuation of the dual system through program duplication at the historically black and historically white schools—substantially interfered with and thus impermissibly fettered that choice. As a result, the court below erred in concluding that the State had fulfilled its constitutional and statutory obligations to treat all individuals without regard to race. Because the proper articulation of those obligations is an important issue that has divided the circuits, this Court should grant the petition.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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JANUARY 1991

APPENDIX A

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 88-4103

JAKE AYERS, SR., ET AL., PLAINTIFFS,

JAKE AYERS, JR., BENNIE G. THOMPSON, LEOLA BLACKMON, LILLIE BLACKMON, LOUIS ARMSTRONG, DARRYL C. THOMAS, AND LEON JOHNSON, PLAINTIFFS-APPELLANTS,

and

UNITED STATES OF AMERICA,
INTERVENOR-APPELLANT,

v.

WILLIAM ALLAIN, GOVERNOR, STATE OF MISSISSIPPI, ET AL., DEFENDANTS-APPELLEES.

Sept. 28, 1990

Appeals from the United States District Court
for the Northern District of Mississippi

Before GOLDBERG, GEE, POLITZ, KING, JOHNSON, GARWOOD, JOLLY, HIGGINBOTHAM, DAVIS, JONES, SMITH, DUHÉ, WEINER and BARKSDALE, Circuit Judges.[1]

DUHÉ, Circuit Judge:

This is an appeal from the dismissal of a lawsuit challenging the racial identity of institutions of public higher education in the State of Mississippi. *Ayers v. Allain*, 674 F.Supp. 1523 (N.D.Miss.1987) (*Ayers I*). A panel of this Court reversed and remanded, *Ayers v. Allain*, 893 F.2d 732 (5th Cir.1990) (*Ayers II*), and rehearing en banc was granted, *Ayers v. Allain*, 898 F.2d 1014 (5th Cir.1990). Finding that the record makes clear that Mississippi has adopted and implemented race neutral policies for operating its colleges and universities and that all students have real freedom of choice to attend the college or university they wish, we affirm.

A. *History*

A detailed outline of the prior history of this case may be found in the opinions of the district court and the panel majority.[2] This is a class action filed in 1975 by black citizens of Mississippi against the Governor of Mississippi, the Board of Trustees of State Institutions of Higher Learning and its members, five

[1] Chief Judge Clark is recused.

When this case was orally argued before and considered by the court, Judge Reavley was in active service. He participated in both the oral argument and the en banc conference. He took senior status, however, on August 1, 1990.

[2] *Ayers I*, 674 F.Supp. at 1524-26, 1528-30; *Ayers II*, 893 F.2d at 733, 743-44.

historically white institutions of higher learning and their chief administrative officers, the State Department of Education, and the State Superintendent of Education.[3] The plaintiffs alleged that the defendants were maintaining and perpetuating a racially dual system of higher education in violation of the Fifth, Ninth, Thirteenth, and Fourteenth Amendments to the United States Constitution, 42 U.S.C. §§ 1981, 1983, and Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d *et seq.* The United States intervened as plaintiff under 42 U.S.C. § 2000h-2 and alleged violations of the Fourteenth Amendment and Title VI. The plaintiffs sought injunctive relief requiring the defendants to conform Mississippi's system of higher education to the constitutional and statutory mandates. The lawsuit remained under the supervision of a three-judge court for ten years and was transferred to the district court for the Northern District of Mississippi in 1985.

The district judge ordered the case tried to the court. The plaintiffs directed their complaint to the following components of higher education in Mississippi: student admissions standards and enrollment, university staff composition, institutional mission, provision and maintenance of facilities, allocation of financial resources, curricular offerings and placement of programs, operation of branch programs, al-

[3] The plaintiff class was certified in 1975 as:

[a]ll black citizens residing in Mississippi, whether students, former students, parents, employees, or taxpayers, who have been, are, or will be discriminated against on account of race in receiving equal educational opportunity and/or equal employment opportunity in the universities operated by said Board of Trustees.

Ayers I, 674 F.Supp. at 1526.

location of land grant functions, and the composition of the Board of Trustees and its staff. The plaintiffs alleged that the vestiges of a dual, racially discriminatory system of higher education persisted in each of the components. They identified the institutions of higher learning in Mississippi as either historically black institutions or historically white institutions[4] as follows:

Historically Black Institutions
Alcorn State University
Jackson State University
Mississippi Valley State University

Historically White Institutions
Delta State University
Mississippi State University
Mississippi University for Women
University of Mississippi
University of Southern Mississippi

The defendants alleged that the Board and each institution maintained good-faith, nondiscriminatory and nonracial admissions and operational policies with respect to students, faculty, and staff, and that the state's duty to disestablish state-imposed segregation extended no further. The defendants also alleged that any racial identifiability of the institutions could not be attributed to state policies.

The district judge conducted a five-week trial and issued detailed and well reasoned findings of fact and conclusions of law. *Ayers I*, 674 F.Supp. at 1526-63.

[4] At the time the Supreme Court rendered its decision in *Brown v. Board of Education*, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954), these institutions were designated for the education of black or white citizens, respectively.

He stated that the law clearly imposed upon Mississippi an affirmative duty to dismantle its racially dual system of education, but that the scope of the duty was not so broad in the context of higher education as in primary and secondary education. He held that Mississippi was not required to achieve a certain level of racial balance in the various components of higher education, but rather was only obliged to adopt and implement good-faith, race-neutral policies and procedures. He relied upon the reasoning of *Alabama State Teachers Ass'n v. Alabama Public School and College Auth.*, 289 F.Supp. 784 (M.D.Ala.1968) (three-judge court), *aff'd*, 393 U.S. 400, 89 S.Ct. 681, 21 L.Ed.2d 631 (1969) and *Bazemore v. Friday*, 478 U.S. 385, 407-09, 106 S.Ct. 3000, 3012-13, 92 L.Ed.2d 315 (1986) (White, J., concurring), in which rules governing primary and secondary education were distinguished on the basis of a state's inability to designate college attendance zones and the broader choices available to students in the context of higher education. *Ayers I*, 674 F.Supp. at 1551-54. The judge's findings and conclusions accorded with this construction of the law, and the plaintiffs have challenged some of those findings and conclusions on appeal. A summary of the district court's challenged findings and conclusions follows:

The Board of Trustees. The Board of Trustees is charged with the management and control of the institutions of higher learning in Mississippi and consists of thirteen members appointed by the governor. No black was appointed to the Board until 1972, but since 1972 three additional blacks have been appointed and three blacks currently serve. With respect to the Board staff, of the twenty-three persons responsible for overseeing the day-to-day operations of the

Board, six are black, and of the fifty staff members responsible for overseeing the guaranteed student loan program, seventeen are black. The district court concluded that the Board had adopted racially neutral hiring policies with respect to its staff. *Id.* at 1550, 1563.

Use of ACT scores in student admissions. Shortly after James H. Merideth applied for admission to the University of Mississippi, the Board adopted certain policies to govern admissions to institutions of higher education in Mississippi.[5] Among these policies was the requirement that all students applying for admission take a test prepared by the American College Testing Program (ACT). The ACT requirement continues to this day. In the mid-1970's the historically black institutions did not require a minimum ACT score for admission, while the historically white schools generally required a minimum score of 15 but also provided qualified admission of students with lower scores. In the latter half of the 1970's the Board sought to address concerns about the underpreparation of incoming students, and beginning in 1977 the Board instituted a new policy declining the admission of any student who did not achieve an ACT score of 9. The Board did not adopt high school grades as an admissions component. During subsequent years the Board granted permission to certain historically white institutions to admit on a probationary or exceptional basis students with scores of less than 15. The Board also granted permission to certain historically black institutions to raise the minimum ACT score while preserving the right to admit on an exceptional basis students who fell be-

[5] *See Meredeth v. Fair*, 305 F.2d 343, 353 (5th Cir. 1962).

low the minimum. *Id.* at 1530-34. The current admissions practices are:

(1) All incoming students are required to take the secondary school "core curriculum". In grades 9 through 12 students are required to have earned a certain number of units in English, mathematics, science, social science, and an elective course. A particular grade point average is not required. Exemptions from the core curriculum requirement are possible, and the exemption policies are more liberal for admission to the historically black institutions.

(2) All Mississippi applicants under 21 are required to take the ACT, and no student who scores below 9 is eligible for admission as a first-time freshman.[6] Within these guidelines the individual institutions maintain different admissions standards. The Board requires a minimum score of 15 for automatic admission to the historically white institutions, although it permits enrollment of up to fifty talented or high-risk students (students presenting a high risk of academic failure) per year per institution with scores below 15. Automatic admission to Mississippi University for Women requires a score of 18, although students with lower scores can be admitted either on an exceptional basis or by achieving a certain grade point average. Automatic admission to Jackson State University, Alcorn State University, and Mississippi Valley State University requires a score of 13, with enrollment permitted for students with lower scores who, for example, are identified as high-risk or talented or who achieve a certain grade point average.

[6] The judge found that students who receive a score of 9 on the English and social studies tests are reading at a ninth-grade level.

On average the ACT scores of Mississippi black students are lower than those of Mississippi white students. However, according to the Deputy Superintendent of Education, ACT scores rise measurably as more students choose to take the core curriculum and a smaller percentage of blacks choose to take that curriculum. Very few black applicants, if any, are denied admission to Mississippi universities as first-time freshman for failure to achieve the minimum ACT score. *Id.* at 1535-36.

(3) Mississippi has numerous public junior colleges which permit automatic enrollment to high school graduates. Students who fail to achieve either the required ACT score or who have not satisfied the core curiculum requirement are permitted to transfer from the iunior colleges to the public universities after the completion of 24 hours with a C average. Some students with low ACT scores are permitted to transfer with as few as 15 hours. Because of the transfer policy, no applicant is denied admission for failure to achieve a particular ACT score, but admission at most is deferred.

The trial judge concluded that the current admissions policies and procedures, including the use of the ACT, were not adopted for a racially discriminatory purpose and are reasonable, educationally sound, and racially neutral. Nearly all black students who applied to historically white universities in the fall of 1986 were accepted. However, the ACT requirement was initially adopted because of its adverse effects on blacks, but admissions policies have changed in the ensuing 25 years. In particular, he concluded that the minimum ACT score of 9 was not adopted in 1976 for discriminatory purposes, but in order to address the problem of underpreparation of incoming

freshman. In addition, the district court found adequate justification for the Board's decision not to adopt high school grades as a component of the admissions requirements; grade inflation and the lack of comparability among Mississippi's high schools justified the Board's policy. *Id.* at 1554-57.

Off-campus centers. The plaintiffs alleged that three off-campus centers competed for students with certain historically black institutions:

(1) In 1966 three extension centers were consolidated to form the Mississippi University Center, located in Jackson near Jackson State University. In 1972 the Board assigned management responsibilities to the University of Mississippi, Mississippi State University, and Jackson State University, and gave the center degree-granting status.

(2) In 1962 the Board granted the University of Southern Mississippi permission to establish a resident center in Natchez, near Alcorn State University. The Plan of Compliance adopted by the Board in 1974 [7] called for the joint participation of the two universities at the Natchez Center, and presently the University of Southern Mississippi offers only noncredit extension courses at the center.

(3) In 1952 the Board recognized a resident center at Vicksburg, and in 1980 approved a consortium arrangement between Alcorn State University and Mississippi State University for activities at the center. *Id.* at 1541-43.

Institutional mission. In 1981 the Board issued a document entitled "Mission Statements." Under the

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[7] *See Ayers I*, 674 F.Supp. at 1530; *Ayers II*, 893 F.2d at 737-38.

statements the public universities were classified as either "comprehensive," "urban," or "regional."

Comprehensive

Mississippi State University
University of Mississippi
University of Southern Mississippi

Regional

Alcorn State University
Delta State University
Mississippi University for Women
Mississippi Valley State University

Urban

Jackson State University

The "comprehensive" designation implies a greater number and higher level of degree offerings, the "urban" designation oriented the institution toward service to the urban community, and "regional" signifies course offerings generally limited to undergraduate instruction. One witness testified that every state but one assigns missions to its universities. Such assignments are required by limited financial resources. *Id.* at 1538-40.

The judge concluded that the 1981 mission designations were not motivated by a discriminatory purpose but rather a need to conserve scarce educational resources. The state was under no duty to use the designations as a device to maximize racial integration. The designations were rationally based on sound educational policies. *Id.* at 1560-61.

Disparities in funding and programs. Differences exist among the institutions with respect to the relative quality and quantity of programs offered, library volumes, and number of faculty with doctorates and degrees from major research institutions. However,

these differences do not correlate with historical racial configuration, but rather with the comprehensive or noncomprehensive designation of a given institution. In particular, no racial pattern exists in program quality among noncomprehensive institutions. *Id.* at 1541.

The plaintiffs alleged that disparities existed in land grant activities between Mississippi's two land grant universities, Alcorn State University and Mississippi State University. Financial allocation for agricultural instruction at the two universities are educationally sound, reasonable, and unaffected by racial considerations. Agricultural research is heavily concentrated at Mississippi State University, which conducts research through the Mississippi Agricultural and Forestry Experimental Station. Since 1972, however, Alcorn State University has conducted a branch experimental station and since 1971 has received limited legislative appropriations for agricultural research. The judge also found that the Mississippi Cooperative Extension Service, an off-campus, separately funded arm of Mississippi State University, operates a branch at Alcorn State University. He concluded that funds for land grant instruction were allocated according to a racially neutral funding formula, and that disparities in land grant programs were not caused by any discriminatory motive. *Id.* at 1543-46.

With respect to funding, the Board allocates a general support appropriation among the universities according to a funding formula. The formula attempts to calculate costs of instruction, the percentage of total need which the costs of instruction represent, and the funds each institution is expected to generate for itself. Institutional mission is an important element in calculating instruction costs, total need, and

expected self-generated funds.[8] The funding formula does not treat the predominantly black institutions inequitably. Mississippi Valley State University benefitted substantially from being grouped with the other regional universities for purposes of calculating instruction costs, and Jackson State University also benefitted from bing grouped with the University of Southern Mississippi. On those occasions when the Board departed from the formula, the predominantly black institutions have benefitted. The district court concluded that differences in funding levels are not attributable to race but to legitimate educational distinctions among the institutions. *Id.* at 1546-48, 1562.

With respect to facilities, from 1970 to 1986 the predominantly black institutions received a greater percentage share of appropriations for new construction than the percentage of system-wide enrollment those institutions represented. In comparing the amount of functional space available per full-time equivalent student,[9] the predominantly black schools rank second, third, and seventh among the eight uni-

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[8] Average cost estimates are based on an aggregation of the institutions into three groups. These groups correspond to the mission designation of the respective universities, except that the University of Southern Mississippi is included with Jackson State University for purposes of establishing an average for the urban group.

[9] Dr. Larry Leslie, Professor and Director of Higher Education at the University of Arizona, testified that the calculation "per full-time equivalent student" was generally performed by adding one-third of the part-time enrollment to the number of students classified as full time. The calculation may also be performed by adding the full-time enrollment to an aggregate of credit hours earned by part-time students divided by the appropriate dividend to reflect full-time equivalence.

versities. The district court found no correlation between the racial identity of the institutions and the quality of the facilities, and concluded that the distribution of funds for capital improvements clearly evinced a good-faith affirmative effort to provide adequate facilities at the historically black institutions. *Id.* at 1548-50, 1562.

B. *The Duty of the State*

It is necessary first to determine the scope of Mississippi's duty to remedy the effects of past de jure discrimination. There is no dispute that, when the Supreme Court decided *Brown v. Board of Education*, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954) (*Brown I*), Mississippi operated a racially dual system of public higher education. *See Meredith v. Fair*, 305 F.2d 343, 350 n. 7 (5th Cir.1962); *Ayers I*, 674 F.Supp. at 1528-30. Mississippi was therefore constitutionally required to eliminate invidious racial distinctions and dismantle its dual system. *Swann v. Charlotte-Mechlenburg Board of Education*, 402 U.S. 1, 18, 22, 91 S.Ct. 1267, 1277, 1279, 28 L.Ed.2d 554 (1971); *Brown v. Board of Education*, 349 U.S. 294, 300-01, 75 S.Ct. 753, 756-57, 99 L.Ed. 294 (1955) (*Brown II*). The precise constitutional obligation of a state with respect to its system of higher education, however, is not so clearly defined as in cases involving primary and secondary education. In the latter cases school authorities have been charged to eliminate all vestiges of state-imposed segregation. *Milliken v. Bradley*, 433 U.S. 267, 289-90, 97 S.Ct. 2749, 2761-62, 53 L.Ed.2d 745 (1977); *Swann*, 402 U.S. at 15, 91 S.Ct. at 1275-76, and "to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and

branch." *Green v. County School Bd.*, 391 U.S. 430, 437-38, 88 S.Ct. 1689, 1694, 20 L.Ed.2d 716 (1968). In two cases outside the context of primary and secondary education, a different standard has been employed. *See Bazemore v. Friday*, 478 U.S. 385, 408, 106 S.Ct. 3000, 3012-13, 92 L.Ed.2d 315 (1986) (White, J., concurring);[10] *Alabama State Teacher Ass'n v. Alabama Public School and College Auth.*, 289 F.Supp. 784 (M.D.Ala.1968), *aff'd per curiam*, 393 U.S. 400, 89 S.Ct. 681, 21 L.Ed.2d 631 (1969). In these cases the governing authorities were deemed to have satisfied their constitutional obligation by discontinuing prior discriminatory practices and adopting and implementaing good-faith, race-neutral policies. *Bazemore*, 478 U.S. at 408, 106 S.Ct. at 3012-13; *Alabama State Teachers*, 289 F.Supp. at 789-90. This Court must therefore determine whether Mississippi's duty to dismantle its prior system of de jure segregation in higher education requires more than the adoption and implementation of good-faith, race-neutral policies and procedures in the components of higher education under review.

We first note that the issues in this lawsuit bear on the defendants' fulfillment of their duty under the Constitution and relevant laws. Neither this Court nor the district court addresses the specific remedies which the defendants must or might undertake in the future. Nevertheless, because the duty outlined in *Bazemore* is essentially a remedial duty and describes, in a general manner, the scope of mandatory remedial action, it is occasionally necessary to refer to specific remedies for the sake of illustration.

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[10] Justice White's concurring opinion was incorportaed into the *per curiam* opinion of the Court. *See Bazemore*, 478 U.S. at 387, 106 S.Ct. at 3002.

In *Green* the Supreme Court expressed its distrust of ostensibly race-neutral policies in primary and secondary school desegregation plans. The Court determined that a school board's adoption of a plan under which students were annually permitted to choose to attend one of the two schools in the county "fail[ed] to provide meaningful assurance of prompt and effective disestablishment of a dual system. . . ." *Green*, 391 U.S. at 438, 88 S.Ct. at 1694. The Court noted that in the three years prior to its decision no white child had chosen to attend the all-black school and that 85% of the black children continued to attend that school. The Court concluded:

> We do not hold that "freedom of choice" can have no place in [a desegregation plan]. * * * Rather, all we decide today is that in desegregating a dual system a plan utilizing "freedom of choice" is not an end in itself. * * * Although the general experience under "freedom of choice" to date has been such as to indicate its ineffectiveness as a tool of desegregation, there may well be instances in which it can serve as an effective device. Where it offers real promise of aiding a desegregation program to effectuate conversion of a state-imposed dual system to a unitary, nonracial system there might be no objection to allowing such a device to prove itself in operation. On the other hand, if there are reasonably available other ways, such for illustration as zoning, promising speedier and more effective conversion to a unitary, nonracial school system, "freedom of choice" must be held unacceptable.

Id. at 440-41, 88 S.Ct. at 1695-96 (footnotes omitted). The Court therefore dismissed the "freedom of choice"

plan before it as ineffective while recognizing that in other circumstances choice could serve as an effective device, particularly when other methods of achieving desegregation are not available.

The role of choice in higher education under current law can be discovered only somewhat more obliquely from the few cases that have addressed the issue. In *Alabama State Teachers* a black teachers' association sued a state body that governed public education in Alabama, seeking to enjoin the construction of a four-year college at Montgomery. The plaintiffs argued that in planning the new college the defendant did not "maximize desegregation." The court held that although a state has an affirmative duty to dismantle a racially dual system of higher education, the scope of the duty did not extend so far in higher education as in primary and secondary education. The court believed the state's duty was satisfied by dealing with admissions, faculty, and staff in good faith. 289 F.Supp. at 789-90.

> Higher education is neither free nor compulsory. Students choose which, if any, institution they will attend. In making that choice they face the full range of diversity in goals, facilities, equipment, course offerings, teacher training and salaries, and living arrangements, perhaps only to mention a few. From where legislators sit, of course, the system must be viewed on a statewide basis. In deciding to open a new institution or build a branch or expand an existing institution, and in deciding where to locate it, the legislature must consider a very complicated pattern of demand for and availability of the above-listed variables, including, also, impact on the dual system. We conclude that in reviewing such a decision to determine whether it maximized desegregation we would necessarily be involved, consciously or by default, in a wide range of educational policy decisions in which courts should not become involved.

Id. at 788. The court recognized that *Green* had cast doubt on the viability of "freedom of choice" plans in primary and secondary schools. The court believed, however, that *Green* did not dictate the same result for higher education, because freedom to choose a college, unlike freedom to choose a primary or secondary school, helps to perform the important function of fitting a student to the right school. *Id.* at 790.

A few years later another three-judge court reached the opposite result. *Norris v. State Council of Higher Education for Virginia*, 327 F.Supp. 1368 (E.D.Va.), *aff'd*, 404 U.S. 907, 92 S.Ct. 227, 30 L.Ed.2d 180 (1971). Black faculty and students at Virginia State College sought to enjoin the expansion of a predominantly white college from a two-year to a four-year institution. The lawsuit challenged the constitutionality of an appropriation act providing for the expansion, an act which it was alleged perpetuated a racially dual system of higher education. The court concluded that the purpose and effect of the expansion was to provide a four-year college for white students, that the appropriation act served to perpetuate a racially dual system of higher education, and that the act therefore violated the Fourteenth Amendment. *Id.* at 1370-71. The court noted that while *Green* addressed desegregation in public primary and secondary schools, "it defined a constitutional duty owed as well to college students." *Id.* at 1373. The court believed only the means of eliminating discrimination in the two contexts differed. *Id.*

Alabama State Teachers and *Norris* announced opposite conclusions on the issue of *Green*'s applicability to higher education, and both decisions were affirmed on appeal to the Supreme Court. The awkwardness is explained by the underlying facts and conclusions in the two opinions. The disposition in *Alabama State Teachers* is entirely dependent on the conclusion that *Green*'s rejection of certain "freedom of choice" plans in primary and secondary schools does not dictate the same result in the college setting. It is therefore doubtful the Supreme Court could have upheld the denial of the injunction without giving sanction to the standard announced by the trial court. This is particularly so in view of the fact that the Supreme Court had the benefit of Justice Douglas' dissent, in which he points out squarely that the trial court had drawn a distinction between levels of education which had not been drawn in prior decisions. *Alabama State Teachers Ass'n v. Alabama Public School and College Auth.*, 393 U.S. 400, 401, 89 S.Ct. 681, 682, 21 L.Ed.2d 631 (1969) (Douglas, J., dissenting); *see Norris*, 327 F.Supp. at 1378 n. 8 (Hoffman, J., dissenting in part). In *Norris*, on the other hand, the granting of the injunction was based on a finding which warranted the injunction regardless of the standard employed. The lower court found that "the *purpose* and effect of [the college's] escalation is to provide a four-year college for white students who reside nearby." *Norris*, 327 F.Supp. at 1371. This finding put the defendants in clear violation of their duty to eliminate invidious racial distinctions. The decision was therefore properly affirmed on appeal, and the lower court's attempts to distinguish *Alabama State Teachers* and adopt *Green* were in no way essential to the resolution of the case.

In *Bazemore* the Supreme Court further clarified the duty of a state outside the context of primary and secondary education. The School of Agriculture and Life Sciences at North Carolina State University operated an extension service that educated farmers in agriculture, organized and operated clubs in home economics and 4-H, and conducted citizens' organizations for community resource development. The extension service had formerly maintained racially segregated branches, but the branches were merged in 1965. Employees, services recipients, club members, and parents sued the president and other officials of the university alleging racial discrimination in employment and services related to the extension service. The record indicated generally that the 4-H and homemaker clubs remained clearly racially identifiable. The district court nevertheless found no evidence of any discrimination after the merger of the two branches and the opening of the clubs to all eligible persons regardless of race, and the adoption of race neutral policies regarding staff.

The Supreme Court held that the case presented no current violation of the Fourteenth Amendment, because the extension service had discontinued its prior discriminatory practices and had adopted a wholly neutral admissions policy. *Bazemore*, 478 U.S. at 408, 106 S.Ct. at 3012-13. The Court gave particular attention to the choices available to those who sought to join the clubs, noting that the choice of a club was entirely voluntary, a person was not compelled to join a club, and no one had the authority to deny a person the right to join a club he or she wished to join. *Id.* The Court noted that while *Green* required greater measures in desegregating primary and secondary schools, it did not govern the voluntary asso-

ciations operated by the extension service. "[H]owever sound *Green* may have been in the context of the public schools, it has no application to this wholly different milieu." *Id.*

It might appear that *Bazemore* is at odds with *Green*, because *Bazemore* approved a desegregation plan substantially similar to the plan rejected in *Green*. The two decisions do not support such exclusive readings, however. *Green* did not invalidate all "freedom of choice" plans, but rather concluded that such a plan alone in the case before the Court did not effectively meet the state's obligation to desegregate its primary and secondary schools. The Court repeatedly emphasized that there was no universal answer, no one plan, that would achieve the goal of desegregation in every case, and that the availability of alternative methods would bear on the effectiveness of a given plan. "[I]n desegregating a dual system a plan utilizing 'freedom of choice' is not an end in itself. . . . '[I]t is only a means to a constitutionally required end—the abolition of the system of segregation and its effects. If the means prove effective, it is acceptable, but if it fails to undo segregation, other means must be used to achieve this end.'" *Green*, 391 U.S. at 440, 88 S.Ct. at 1695 (quoting *Bowman v. County School Board*, 382 F.2d 326, 333 (4th Cir.1967) (Sobeloff, J., concurring)). *Bazemore* is therefore not at odds with *Green*. *Bazemore* simply provides an instance, anticipated by *Green*, of freedom of choice proving itself in operation.

While the two decisions are not at odds, a court presented with a freedom-of-choice plan must nevertheless determine whether the plan must be rejected under *Green* or may be approved under *Bazemore*.

A decision of the Sixth Circuit illustrates the difficulty in drawing the line. *See Geier v. Alexander*, 801 F.2d 799 (6th Cir. 1986). Tennessee had formerly maintained a racially segregated university system, and several individuals sued the state to prevent the construction of a non-degree granting center close to a predominantly black university. The scope of the lawsuit expanded to include desegregation of the public universities generally, and after many years of litigation the parties agreed to a consent decree. The United States objected to a provision of the decree which required the defendants to select 75 black students yearly for entry into professional programs. The United States argued, among other things, that the provision violated the equal protection rights of non-minority students, because under *Bazemore* a state has no obligation to remove the vestiges of prior discrimination in higher education but need only establish neutral admissions standards.

The Sixth Circuit held that the district court was entitled to impose affirmative remedies to remove the vestiges of prior discrimination and that the provision at issue contained a permissible remedy. The court believed that *Green*, not *Bazemore*, governed the issue of desegregation in public universities, and that the United States had "read[] too much into *Bazemore*." The court stated that while no one is compelled to enter a profession, if he wishes to do so he must pursue the appropriate course of study at a university. The court also stated that an advanced education is more valuable than the services provided by the 4-H and homemaker clubs under review in *Bazemore*, and that the state's interest in educating its young people therefore required the application of *Green*. *Id.* at 804-05.

We disagree with both the holding and reasoning in *Geier*. The *Geier* court applied the *Green* standard after distinguishing *Bazemore*, a case which in turn had distinguished *Green*. We believe the Sixth Circuit incorrectly performed this awkward legal arithmetic. *Bazemore* relies entirely on the choices available to persons who wished to join the clubs under review. The *Bazemore* opinion does not address the character of the programs or the importance of the clubs to the communities they serve, nor does it make any distinction between supplementary education and the conferral of degrees. It states only that the choices available to potential club members serve to distinguish the clubs from primary and secondary schools. It therefore makes little sense why other factors, which formed no part of the reasoning, should serve to distinguish the decision and consequently require a university to submit to the *Green* standard.

If *Bazemore* had not relied on choice alone it would nevertheless be difficult to make the kind of distinctions that the *Geier* court made among the different offerings of a public university. If the law demanded a different obligation of the state with respect to different university offerings, a university could never be judged as a whole. One portion of a given lawsuit directed at "*Bazemore*-type" programs would be resolved by different standards and call for different remedies than another portion directed at "*Green*-type" programs. Distinctions would be made between and among continuing education, professional curricula, research fellowships, athletics, and the like. Such distinctions would be based on the doubtful premise that a state has a different constitutional obligation with respect to separate university offerings.

It would be even more difficult to determine on what bases these different obligations could be allotted, and in this regard *Geier* is particularly unsatisfactory. The notion that a person must pursue the appropriate course of university study in order to enter a profession does not mean that a person has no choice but to enter a university, and does not equate an aspiring professional to a student at a primary or secondary school. The comparison to primary and secondary schools is valid only if the state somehow has a compelling interest in assuring that persons enter professions. The court's statement that membership in an extension service is valuable but cannot be compared to the importance of education ignores the fact that the 4-H and home economics divisions of the extension service in *Bazemore* were engaged in the education of their club members. *See Bazemore*, 478 U.S. at 389, 106 S.Ct. at 3003 (Brennan, J., concurring), 410 (Brennan, J., dissenting in part). The root problem with the *Geier* court's reasoning was correctly identified by the panel majority in the present case as an improper "hierarchy of values." *Ayers II*, 893 F.2d at 745. Such a hierarchy is purely subjective, impossible to apply, and not founded on the Constitution.

We believe that *Bazemore* and *Alabama State Teachers* provide the proper standard to govern Mississippi's efforts to disestablish prior de jure segregation in its universities. Universities are not simply institutions for advanced education. They differ in character fundamentally from primary and secondary schools, and the duty outlined in *Green* cannot bring about the disestablishment of prior de jure segregation in higher education except at the expense of the very goals *Green* sought to achieve. The most

obvious differences concern attendance and the choice of institution. An entire range of remedial options available for the desegregation of the public primary and secondary schools is not available in the context of higher education simply because attendance at a university is voluntary and persons may choose which of several universities to attend. This is not merely a problem of discovering the appropriate "means" of eliminating discrimination as the *Norris* court stated. *Norris*, 327 F.Supp. at 1373. *Green* acknowledged that the viability of a "freedom of choice" plan would be dependent in part on the number of effective remedial alternatives. *Green*, 391 U.S. at 439-41, 88 S.Ct. at 1694-96. The Court twice mentions zoning as such an alternative. *Id.* at 441, 442, 88 S.Ct. at 1696. It hardly needs mention that remedies common to public school desegregation, such as pupil assignments, busing, attendance quotas, and zoning, are unavailable when persons may freely choose whether to pursue an advanced education and, when the choice is made, which of several universities to attend.

A second difference concerns the uniformity of primary and secondary education as contrasted with the diversity of a university education. *See Alabama State Teachers*, 289 F.Supp. at 788. The idea of diversity is crucial to the task of assigning the proper duty to the state of Mississippi, because diversity raises questions of choice discussed in both *Green* and *Bazemore*. The central difficulty is that *Green* would impose a regime of imperatives and uniformity on what are in essence diverse institutions, and in so doing would destroy the choices available to both black and white citizens of Mississippi. For example, consistent with *Green* the plaintiffs have asked for the merger of branch centers with nearby historically

black universities, enhancement of programs at historically black universities to bring them to parity with programs at historically white universities, redesignation of the missions of the historically black universities, and the termination of certain programs so that those programs will be offered only at the historically black universities. To the extent these remedies attempt to force a potential student to attend a particular university, they reduce that student's choice among institutions. To the extent these remedies impose uniformity among the eight institutions, they render the student's choice valueless and return to the unacceptable "separate but equal" principle. The district court found that approximately 30% of all black college students attending four-year colleges in the state attend one of the comprehensive universities. *Ayers I*, 674 F.Supp. at 1562. Imposing remedies argued for by plaintiffs under *Green* would force some of those students, who presently enjoy the benefits of a comprehensive university, either to look to another institution or forgo their education. Equal protection is not served by closing doors which this country and this circuit in particular have taken great pains to open. If an aspiring student may freely choose to attend college, if he may freely choose among all institutions in the state, and if no authority exists to deny him the right to attend the institution of his choice, he is done a severe disservice by remedies which, in seeking to maximize integration, minimize diversity and vitiate his choices. *Bazemore* properly takes account of the "wholly different milieu" of a voluntary association. *Bazemore*, 478 U.S. at 408, 106 S.Ct. at 3013. Under *Bazemore* latter-day Merideths are not routed to what the government deems the appropriate institution, but may

attend any institution they wish. Under *Green* as contended for by plaintiffs they may attend only the institutions that a federal judge has meticulously selected, grafted and pruned for them.

We therefore hold that to fulfill its affirmative duty to disestablish its prior system of de jure segregation in higher education, the state of Mississippi satisfies its constitutional obligation by discontinuing prior discriminatory practices and adopting and implementing good-faith, race-neutral policies and procedures.[11]

C. *The District Court Judgment*

The district court concluded that the State of Mississippi had met its affirmative duty to disestablish its former de jure segregated system of higher education. Underlying this conclusion are the numerous findings outlined above regarding Mississippi's adoption of good-faith, race-neutral policies and procedures in the several components of higher education

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[11] The plaintiffs argue that the defendants are required to comply with certain regulations issued by the Office of Civil Rights of the Department of Education. *See* 34 C.F.R. § 100.3 (b) (6) (i) (1989). The regulations generally require a recipient of Title VI assistance who has previously discriminated against persons on the ground of race to take affirmative action to overcome the effects of prior discrimination. Under the present record we are not prepared to say the defendants have failed to meet the duties outlined in the regulations. It is unnecessary, however, to discuss the scope of Mississippi's duty under the regulations. The plaintiffs in *Bazemore* challenged the extension service's goverance of the 4-H and homemaker clubs under Title VI. *See Bazemore v. Friday*, 751 F.2d 662, 687 n. 128 (4th Cir. 1984). There cannot be any question, therefore, that the duty outlined by the Supreme Court in *Bazemore* controls in Title VI cases.

under review. The district court properly treated Mississippi's current practices as matters of fact. *Pullman-Standard v. Swint*, 456 U.S. 273, 288-90, 102 S.Ct. 1781, 1789-91, 72 L.Ed.2d 66 (1982); *Dayton Bd. of Educ. v. Brinkman*, 443 U.S. 526, 534 & n. 8, 99 S.Ct. 2971, 2977 & n. 8, 61 L.Ed.2d 720 (1979). We therefore review those findings for clear error. Fed.R.Civ.P. 52(a); *Pullman-Standard*, 456 U.S. at 290, 102 S.Ct. at 1791.

The plaintiffs argue that the district court should have assessed the defendants' practices under *Green*, and the plaintiffs' allegations of clear error rest in large part on the contention that the court applied the incorrect remedial duty. Consequently, with respect to many of the court's findings the plaintiffs do not argue in the usual manner that the findings are clearly erroneous, but rather that the court reviewed the facts under the wrong standard and thus drew the wrong conclusions from those facts. A large number of the court's findings are therefore themselves not in dispute and, as discussed below, when reviewed under the standards this Court has adopted, point only to institutional, not constitutional, inequities. Two components at issue, however, bear directly on the choices afforded to current and potential students at Mississippi universities. Mission designation and admissions criteria require close review, since it is chiefly through these components that Mississippi either satisfies or fails to satisfy its duty to provide true choice to its citizens.

(i)

The plaintiffs argue that the mission designations perpetuate the inequalities of the prior dual system, because missions were assigned on the basis of the

institutional resources as they existed at the time of designation. The essence of the argument is that historically black institutions remain "Black Schools" by the regional or urban designation. We recognize that for purposes of this lawsuit it is necessary to describe institutions as either historically black or historically white. But since this lawsuit examines the current practices of the state of Mississippi, the use of the terms Black School and White School, based as they are on racial identifiability alone, is misleading. In the context of mission designation these terms imply that institutions were an urban or regional designation as an individual would wear the mark of a lower rank. What is wholly ignored by the terms Black School and White School is that the rights of citizens, not institutions, are at issue in this lawsuit, and it is from the standpoint of individual rights, not institutional parity, that Mississippi's practices must be reviewed. The law clearly does not permit state universities to assert equal protection rights in the manner of an individual. *See United States v. Alabama*, 791 F.2d 1450, 1454-57 (11th Cir.1986), *cert. denied*, 479 U.S. 1085, 107 S.Ct. 1287, 94 L.Ed.2d 144 (1987). Despite the plaintiffs' assurance that they do not make any such argument, their desire that Mississippi universities be redisignated so as to enlarge the scope of education at the historically black institutions is no less than a request to allot an equal protection remedy to those institutions in the manner of an individual. If black citizens in Mississippi may choose among any of the eight universities in the state, it is no denial of their right to equal protection that certain institutions formerly segregated by law continue to provide a more limited range of educational options than other institutions in the state.

The district judge found that the mission designations were not motivated by a discriminatory purpose but were rationally based on sound educational policies and a need to conserve scarce educational resources. *Ayers I*, 674 F.Supp. at 1561. Dr. Larry Leslie, Professor and Director of Higher Education at the University of Arizona, testified for the plaintiffs concerning the funding of the institutions. In one portion of his analysis he sought to compare the funding among the institutions within each of the mission designations. Because there were no predominantly black institutions in the comprehensive category and no predominantly white institutions in the urban category, he compared the three comprehensive schools to the one urban school. As of 1986 he found greater total revenue per student, greater state and local appropriation, greater tuition and fees collected, and somewhat greater gifts, grants, contracts, and other income at the comprehensive universities than at the urban, predominantly black, university. It is reasonable to conclude that, at least to some degree, these findings reflect the different missions of the institutions being compared. In comparing both predominantly black and predominantly white institutions within the regional category, however, Dr. Leslie described his findings as "mixed." As of 1986 Alcorn State and Mississippi University for Women received the greatest total revenue per student, with Delta State and Mississippi Valley State somewhat far behind. Alcorn State also collected more in tuition, fees, gifts, grants, contracts, and other income than any other regional university, and spent markedly more for instruction and other activities per student. Dr. Leslie's testimony as a whole indicates that the state is faithful to the mis-

sion designations and is not using them to disguise unequal treatment of those who attend predominantly black institutions.

Dr. John Millet, an academic consultant on issues in higher education and administration, testified for the defendants on the subject of mission designations. He believed that the 1981 mission statements had confirmed the existing structure of the state universities. He also stated that the United States Department of Education similarly classifies all academic institutions by purpose as either doctoral granting, comprehensive, general baccalaureate, specialized, and two-year. In his opinion Mississippi's mission designations were well-defined, educationally sound, and efficient.

Dr. Joseph Johnson, Vice President for Development at the University of Tennessee, testified for the defendants as an expert in higher education administration and finance. He stated that in a 1984-85 study comparing Mississippi's comprehensive universities (historically white) to universities of similar mission elsewhere in the South, the Mississippi institutions faired worse in funding than all other institutions. The one urban institution (historically black) and the four regional institutions (two historically black and two historically white) in Mississippi, on the other hand, stood above the average for like institutions in the South. For the academic year 1985-86 he believed that the two predominantly black universities designated as regional were much better financed than Mississippi's comprehensive institutions relative to institutions of similar mission in other states.

Dr. Thomas Meredith, an academic programs officer for the Board of Trustees, testified that the mission statements did have the effect of maintaining

the status quo of program offerings at the predominantly black universities. He was asked by counsel for the United States whether the mission statements limited the level and scope of programs at those institutions, and responded as follows:

> It put boundaries around all institutions. Up until that time all institutions had been operated under the premise that they needed to do everything for everyone. We were a state of two and a half million people and dwindling resources, and the Board of Trustees felt that it needed to give each institution a direction, and boundaries as well, and utilizing all of the elements that you see in the mission statements that the state would be covered. All of those things would be addressed that this state needed to be about and needed to have, but, yes, institutions did have boundaries. You need to concentrate your resources on certain things and quit trying to just keep on doing more. That was a problem.

The record therefore supports the plaintiffs' argument that the mission designations had the effect of maintaining the more limited program scope at the historically black universities. As noted above, however, this fact alone does not deny the plaintiffs their right to equal protection. The record amply supports the findings of the district court that the designations are commonly used, educationally sound, and not motivated by discriminatory intent. Those findings are not clearly erroneous. This is not to say the mission designations adopted by Mississippi efficiently allocate the state's resources. The district judge concluded the very opposite. *Ayers I*, 674 F.Supp. at 1563-64. This Court nevertheless cannot pass on the

financial wisdom of the designations. It is necessary only that black citizens enjoy full equal protection of the laws in attending their choice of institution, however financially infirm the system of higher education as a whole may be.

(*ii*)

The plaintiffs challenge the policies governing admission to the eight universities on several grounds. They first argue that the ACT requirement was adopted for a discriminatory purpose and continues to have a severe discriminatory impact on black applicants. They therefore argue that the ACT policy is intentionally discriminatory and violates equal protection. In support of their argument they cite *Hunter v. Underwood*, 471 U.S. 222, 105 S.Ct. 1916, 85 L.Ed. 2d 222 (1985). In *Hunter* the Supreme Court struck down a provision of the Alabama Constitution adopted by convention in 1901 which disenfranchised persons convicted of crimes of moral turpitude. The Court held that because the provision was motivated by a desire to discriminate against blacks and the provision continued to have that effect, it violated equal protection. *Id.* at 233. The plaintiffs' argument ignores the fact that Mississippi's current admissions policies trace chiefly to the latter 1970's and, as the district court correctly found, the Board was not then motivated by discriminatory intent but by the problem of underprepration of incoming students. The racial impact of the Board's 1961 blanket ACT requirement, adopted undeniably for discriminatory purposes, has been negated by the numerous qualifications and exceptions outlined earlier. The bare requirement that the test be taken no longer prevents anyone's admission to Mississippi universities. The ability of an applicant to transfer from a junior college without satisfying an ACT score requirements were not adopted until long after conclude that no applicant is denied the opportunity to attend a Mississippi university for failure to achieve a particular score. In addition, minimum score requirements were not adpoted until long after the test requirement, and the fact that the minimum score requirement may have discriminatory impact does not render it unconstitutional. *Washington v. Davis*, 426 U.S. 229, 239-41, 96 S.Ct. 2040, 2047-48, 48 L.Ed.2d 597 (1976).

The plaintiffs also argue that the defendants' admissions practices are intentionally discriminatory, because the Board does not require the use of high school grades in conjunction with ACT scores. The plaintiffs note that the American College Testing Program recommends that ACT scores be used in conjunction with other criteria such as grades in order to gain as complete a profile as possible of the applicant.

We find no support in the record for the assertion that the Board's failure to use grades as an admissions component points to intentional discrimination. First, while the Board itself does not require the use of high school grades, the individual institutions do use grades in identifying high-risk or exceptional students for special admission. Second, even assuming the policy is narrow, inaccurate, and educationally unsound, it does not follow that the policy is thereby intentionally discriminatory. Third, Dr. Meredith testified that in 1976 there was concern both in Mississippi and nationally with grade inflation, that grades did not mean as much as they used to mean, and that they were not a true reflection of what an applicant had

learned. He stated that primary and secondary schools varied tremendously from one part of the state to another, particularly in the sciences where, for example, a given school might offer chemistry without providing lab facilities. He also stated that the Board was advised by ACT administrators that while the use of grades with the ACT would provide a better assessment, they were satisfied with the use of the ACT alone. Dr. Meredith's testimony is supported by the fact that, as with grades generally, the Board does not require students to achieve a certain grade point average in completing the core curriculum.

The plaintiffs also argue that the district court's findings improperly focussed on reasonableness and neutrality rather than viewing the policies from the standpoint of an affirmative remedial obligation. Although we believe, as discussed above, that the duty outlined in *Green* does not apply in this case, we would be reluctant to say the defendants have not met their duty even under *Green*. The admissions policies of the various institutions are extremely flexible and address both academic preparation and the need to recognize less common measures of achievement. The comprehensive institutions maintain a very modest ACT score requirement while setting aside a portion of their enrollment for those who do not meet the objective criteria. Only a few black first-time applicants are turned away from the comprehensive universities for failure to meet the ACT score requirement. Students are required to satisfy a course of core studies in high school, but they are required only to attend, not to achieve a particular grade-point average. The district court gave full consideration to all aspects of the admissions process and found that current admissions policies and procedures in effect in Mississippi universities were adopted and developed in good faith and for nondiscriminatory purposes. These findings are not clearly erroneous.

(*iii*)

The plaintiffs have raised several arguments regarding racial incidents at the University of Mississippi, the racial composition of the faculty and staff, unsuccessful applicants for adminstrative positions at Mississipupi State University, and the fact that a black has not occupied a particular seat on the Board of Trustees. While these problems may be serious, they do not provide enough of a factual basis to persuade us that the district court erred in concluding Mississippi had met its duty to dismantle its dual system.

With respect to the racial composition of the faculty and staff specifically, the record indicates that from at least 1977 to 1986 the percentage of black faculty hired at each of the five predominantly white universities exceeded the black representation in the qualified labor pool. Bernard Siskin, a statistician and labor analyst, testified on faculty hiring and composition, among other matters. He provided both a "snapshot" of faculty present at a given time and a study of hiring over a period of time. The current aggregate faculty composition showed black representation lower than the qualified labor pool, a result Siskin attributed to pre-1974 hires and high black turnover. At two of the institutions Siskin stated that the discrepancy between black hiring and current black representation had disappeared through post-1974 hiring and the turnover of older faculty.

Dr. Forest Wyatt, President of Delta State University, testified that the Board had communicated with his institution regarding increasing black faculty

and other employment. He stated that he was instructed to increase black presence at Delta State and that the instructions were forwarded to deans, department heads, and others in employment positions at the university. He believed those individuals carried out those goals to the best of their ability. He also testified specifically regarding the university's successful effort to recruit a black admissions counselor to attract more black students to the university.

Dr. Victor Feisal, Vice-president for academic affairs at Memphis State University, testified concerning the difficulties in minority faculty recruitment. He stated there was a tremendous shortage of black students with graduate degrees, and extreme competition among educational institutions and the business community for their services. He also stated that financial conditions made it particularly difficult for Mississippi to attract those candidates, because Mississippi is not competitive with other states in faculty salaries and funding of higher education.

(*iv*)

The plaintiffs have pointed to disparities between the historically black and historically white institutions regarding program offerings and duplication among universities and branch centers, faculty, funding, library volumes, facilities, and land grant programs. The district court correctly concluded that the defendants had met or exceeded their duty to disestablish prior de jure segregation in these areas, and we have nothing to add to the district court's opinion except the following.

The district court incorrectly concluded that the disparties among the institutions were not reminis-

cent of the former de jure segregated system. *Ayers I*, 674 F.Supp. at 1560. On the contrary, the disparties are very much reminiscent of the prior system. The inequalities among the institutions largely follow the mission designations, and the mission designations to some degree follow the historical racial assignments. But this does not mean the plaintiff class is denied equal educational opportunity or equal protection of law. The defendants have adopted good-faith, race-neutral policies and procedures and have fulfilled or exceeded their duty to open Mississippi universities to all citizens regardless of race. Their policies toward institutions are not racially motivated. Institutional differences remain, but in order to level those differences under principles of equal protection this Court would somehow have to adopt the plaintiffs' terms "Black School" and "White School" and attach legal significance to those terms. This Court therefore cannot adjust the equities in the manner the plaintiffs request unless we declare, with the force of law, that Alcorn State University, Jackson State University, Mississippi Valley State University, shall henceforth be designated as Black Schools for black students, and shall at all times remain equal in funding, offerings and facilities with their counterparts designated as White schools. We need not cite the source for this revolting principle.

The judgment is AFFIRMED.

GOLDBERG, Circuit Judge, with whom POLITZ, KING and JOHNSON, Circuit Judges, join, dissenting:

I respectfully dissent from the well-organized and well-expressed opinion written by Judge Duhé for the

en banc court. This opinion is an important one, and one would expect there to be diverse opinions, but that does not diminish the strength of my conviction that the district court judgment should be reversed. Judge Duhé has admirably expounded the en banc court's point of view, but I adhere to the panel's majority opinion. *Ayers v. Allain*, 893 F.2d 732 (5th Cir. 1990).

I do not wish to trespass on the court's time in needless elaboration or repetition. The district court and our panel have already thoroughly analyzed this case. Many hours have previously been expended in its explication. The jurisprudence explored and the authorities cited in the panel's majority opinion clearly point to the conclusion that this case should be remanded to the district court. I would remand for proceedings not inconsistent with the principles and doctrines expostulated in the original panel's majority opinion.

PATRICK E. HIGGINBOTHAM, Circuit Judge, concurring * in part and dissenting in part. POLITZ and KING, Circuit Judges, join in the dissent portion of this opinion.

The district court held that the State of Mississippi has no duty to eliminate the vestiges or effects of its overt discrimination against blacks in the administration of its university system. To the contrary, the district court concluded that the state's obligation ended when it adopted an open admissions policy and stopped

* I would affirm the district court's judgment that Mississippi is not engaged in purposeful discrimination. It follows that the inquiry on the remand I would order would focus on the causal relationship between the de jure system and the present practices, as I explain in the text.

purposeful racial discrimination. Today, we affirm this erroneous view of Mississippi's obligation to its black residents. I dissent.

The district court has prepared a careful opinion exploring the difficulties and complexities of the university system, and the majority finds record support for the district court's factual findings. The difficulty is that the majority today deferentially affirms the district court's answer to the wrong question. That deference is undue. It is well settled that "if the trial court bases its findings upon a mistaken impression of applicable legal principles, the reviewing court is not bound by the clearly erroneous standard." *Inwood Laboratories v. Ives Laboratories*, 456 U.S. 844, 855 n. 15, 102 S.Ct. 2182, 2189 n. 15, 72 L.Ed.2d 606 (1982) (citing *United States v. Singer Manufacturing Co.*, 374 U.S. 174, 177, 83 S.Ct. 1773, 1775, 10 L.Ed.2d 823 (1963)). I would not attempt to adopt the correct legal standard and on appeal apply it to these facts. Rather, I would remand this case to the district court for application of the correct legal standards. It would be for the trial court to decide whether those standards necessitate a new factual inquiry.

The majority denies that *Green v. County School Board*, 391 U.S. 430, 88 S.Ct. 1689, 20 L.Ed.2d 716 (1968), extends to higher education, and Judge Goldberg's dissent disputes this assertion. With all respect, the question is not the application of *Green* to higher education. *Green* rejected freedom of choice plans as a complete response to the state's duty to end segregated schools. Contrary to the implicit assumptions of the majority, however, *Green* is not the genesis of the state's constitutional duty to correct the injury it has unconstitutionally caused. The duty to undo the wrong springs directly from *Brown v. Board of Edu-*

cation, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954).

To my light, *Green* rests on a system of mandated education and has little application to a system of higher education that has no compulsory attendance. But concluding that *Green* is inapplicable to higher education does not carry the further conclusion that a state that has maintained a de jure system does not remain under a continuing obligation to otherwise administer its university program in ways calculated to undo the injuries of its segregated past.

Bazemore v. Friday, 478 U.S. 385, 106 S.Ct. 3000, 92 L.Ed.2d 315 (1986), is not contrary to the position I urge today. In *Bazemore* the court held that, because the students enjoyed the right to choose the club they wished and because the differing make-ups of the clubs were not the product of discrimination, the state had done its duty. Here, we deal with the delivery by a state of an array of educational services. That it has no constitutional duty to achieve any particular racial mix is not necessarily a full response to the more general question of whether it has discharged its duty to undo its wrong. Having openly discriminated in the delivery of educational service in virtually all its operations, Mississippi remains under a duty not to perpetuate segregation by its policies. Curiously, the district court found that

> the defendants undertake to fund more institutions of higher learning than are justified by the amount of financial resources available to the state, but that is a policy decision of the Legislature that affects the quality of the institutions among which the monies must be so thinly divided. Such a decision by the Legislature goes to

> the quality of the institutions and not to the constitutionality of the funding.

674 F.Supp. 1523, 1564 (N.D.Miss.1987). The district court noted the

> inefficiency . . . of having two state universities only 20 miles apart in the eastern part of the state with separate administrations and duplicating programs, and two state universities on the western side of the state only 50 miles apart, each with separate administrations and duplicating programs.

Id. at 1563-64. The district court also found it irrelevant that the state funded "traditionally black and traditionally white universities which duplicate as many as 75% of each other's baccalaureat programs." *Id.* Funding decisions such as these, however, cannot be passed over so summarily if they frustrate the state's duty to eliminate the vestiges of past discrimination.

I reject *Green*'s application to university education because I do not believe the Fourteenth Amendment supports a substantive right to a particular racial mix, certainly in the absence of mandatory and state controlled attendance. I am persuaded that in this context the command of the Fourteenth Amendment translates to fair *process* and here find some common ground with the majority. When a system of higher education presents every person with a truly equal and free choice among schools, that system will be constitutional. Well and good, but the long years of separatism have worn deep traces—so deep that declarations of freedom of choice draped over them are not so easily translated to real choice. The force of this reality led to the much debated constitutional rule

in *Green*, fourteen years after *Brown v. Board II*, and although I maintain that its restatement of *Brown* is not applicable to higher education, it yet informs the present question whether Mississippi is discharging its duty.

A state violates its duty to undo its wrong when it makes decisions that directly reinforce the historical traces of separate post-secondary educational paths for blacks and whites. When a party challenging a particular state action demonstrates the adverse effect of that action on the state's duty to remove vestiges of discrimination, the burden should then shift to the state to identify the legitimate state purpose of the action and to prove the absence of an equally effective, less frustrating alternative. Despite the difficulties in other contexts with this familiar equal protection analysis, here it provides a disciplined *process*-based inquiry that pushes federal courts toward the sidelines of education policymaking without leaving states free to ignore their duty. This analysis highlights the importance of segregative *effects* and locates the essential causal relationship between a past de jure dual system and a present de facto one. *Columbus Board of Education v. Penick*, 443 U.S. 449, 501, 99 S.Ct. 2941, 2958-59, 61 L.Ed.2d 666 (1978) (Rehnquist, J., dissenting) "The relevance of past acts . . . depend[s] on whether 'segregation resulting from those actions continues to exist.'" (quoting *Keyes v. School District*, 413 U.S. 189, 210, 93 S.Ct. 2686, 2698, 37 L.Ed.2d 548 (1973)). Finally, it recognizes that the affirmative duty to undo is confronted in the ongoing administration of the schools. It differs from the majority in another critical respect by not insisting on proof of purpose. *Washington v. Davis*, 426 U.S. 229, 96

S.Ct. 2440, 48 L.Ed.2d 597 (1976). This case is about remedy—detecting present effects of the earlier wrong and defining the remedial response. By insisting on proof of purpose, the majority wipes away the earlier wrong by denying the very existence of any notion of perpetuation. Perhaps as a matter of fact Mississippi has discharged its duty to undo any present injury from the past. However, we cannot avoid the inquiry by restricting it to purposeful acts.

The majority rests its decision on the principle of free choice. I have no quarrel with this abstraction since I view Mississippi's constitutional obligation to be to ensure that freedom of choice is real, not just theoretical. But it is not enough that Mississippi no longer operates a de jure segregated educational system; the state must also cease to perpetuate the traces of segregation.

The judiciary is not competent, nor is it otherwise the appropriate institution, to set education policy. But we are duty-bound to decide this case, a case insisting that the state exercise its right to run its schools within the limits of the Constitution. I do not claim to have answers to the difficult questions to be faced in the specifics of what Mississippi can and must do. Perhaps there is little, but that must be decided by the trial judge operating under the correct legal standard.

We must view this case against the bold relief of the undisputed fact that the first black students were not admitted to Mississippi's white universities until 1962 and that white students were not admitted to the black universities until 1966. A disproportionate share of funding for facilities went without apology to the white institutions until at least 1970, and faculty desegregation did not even begin until the

1970's. Indeed, no comprehensive plan to dismantle the double system was adopted until 1974, and that plan was rejected by H.E.W. and has never been funded. The black schools were distinctively inferior to the white schools. As part of its program of diversity and free choice the schools were assigned educational missions—the white schools were to be "comprehensive" whereas the black "urban" schools were to serve a less ambitious purpose. This earlier discrimination in funding is now said to be only a reflection of the schools' different missions and are pointed to as examples of desired diversity in educational offerings.

I do not say from this remote appellate post that Mississippi has failed to meet its duty. I say that we have not yet asked that question, and we must.

APPENDIX B

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 88-4103

JAKE AYERS, SR., ET AL., PLAINTIFFS, JAKE AYERS, JR., BENNIE G. THOMPSON, LEOLA BLACKMON, LILLIE BLACKMON, LOUIS ARMSTRONG, DARRYL C. THOMAS and LEON JOHNSON, PLAINTIFFS-APPELLANTS,

and

UNITED STATES OF AMERICA,
INTERVENOR-APPELLANT,

v.

WILLIAM ALLAIN, GOVERNOR,
STATE OF MISSISSIPPI, ET AL.,
DEFENDANTS-APPELLEES.

Feb. 6, 1990

Appeals from the United States District Court
for the Northern District of Mississippi

Before GOLDBERG, JOHNSON and DUHÉ, Circuit Judges.

GOLDBERG, Circuit Judge:

" 'The time has come,' the Walrus said, 'To talk of many things:

Of shoes—and ships—and sealing wax—Of Cabbages —and kings—

And why the sea is boiling hot—and whether pigs have wings.' " [1]

We'll sit and chat of times gone by, and visit with the queens

Brown, and *Sweatt* and *Meredith* not to mention the fertile *Green*

And then we'll see why *Ayers* should fly and how equality is king!

Today we write an opinion concerning a class action lawsuit involving the public universities of Mississippi. The question is whether the racial identity of these institutions results from the free choice of the students or from state policies and practices.

A group of plaintiffs filed this lawsuit against the Governor of Mississippi, the Board of Trustees of State Institutions of Higher Learning of the State of Mississippi, the Commissioner of Higher Education, and other state officials in January, 1975. These private plaintiffs consists of a class certified by the district court as:

> all black citizens residing in Mississippi, whether students, former students, parents, employees or taxpayers, who have been, are, or will be discriminated against on account of race in receiving equal educational opportunity and/or equal employment opportunity in the universities operated by said Board of Trustees.[2]

[1] Lewis Carroll, *Through the Looking Glass and What Alice Found There*, Chapter IV, Tweedledum and Tweedledee (1872), *reprinted in The Complete Illustrated Works of Lewis Carroll* 117 (Guiliano ed. 1982).

They have alleged that the defendants were maintaining and perpetuating a racially dual system of public higher education in violation of the equal protection clause of the fourteenth amendment and Title VI of the Civil Rights Act of 1964.

The United States intervened as a plaintiff shortly thereafter making identical allegations. The private plaintiffs and the United States, collectively referred to as "the plaintiffs," seek an injunction directing the defendants to eliminate all vestiges of the racially segregated system of higher education in Mississippi.

The defendants answered the plaintiffs' allegations arguing that the existence of predominantly one race universities does not violate the equal protection clause because Mississippi has implemented, in good faith, a nondiscriminatory admissions and operations policy. The defendants believe that the identifiability of the universities by the racial composition of the student population results from the free and unfettered choice of the students themselves.

In the spring of 1987, a five week trial was conducted in Oxford, Mississippi following twelve years of pretrial preparation. The record consists of 4,400 pages of trial testimony and approximately 2000 exhibits. At the end of 1987, the district court ruled for the defendants on the issue of liability and dismissed the plaintiffs' case.[3] The plaintiffs appeal.

[2] *Ayers v. Allain*, 674 F.Supp. 1523, 1526 (N.D.Miss.1987).

[3] *Id.* at 1564.

I. THE FACTS

A. *A History of De Jure Discrimination*

The Mississippi university system consists of eight institutions and several entities under the plenary power of a Board of Trustees (the "Board").[4] These universities were segregated by race through the spring of 1962, contrary to the Supreme Court's 1954 mandate in *Brown v. Board of Education*,[5] when our court forced the University of Mississippi to admit its first black student, James Meredith.[6] Prior to the

[4] The Board, created in 1932, is the governing body of all of the state universities in Mississippi. The Board consists of 13 members. From 1932 to 1972, the members of the Board were all white. At the time of trial in 1987, three of the thirteen members were black.

The governor of Mississippi, with the consent of the Mississippi Senate, appoints twelve members of the Board. Ten must reside in the geographical district that they represent. The other two are chosen at-large from the state. Members serve staggered twelve year terms so that every four years four seats are open for selection.

In addition, a special seat belonging to the University of Mississippi alone, designated the LaBauve Fund seat, has a four year tenure so that the seat is available at the same time one-third of the Board turns over. The month before the district court issued its opinion, the people of Mississippi abolished by popular vote the LaBauve Fund seat. The governor appointed and the senate confirmed four white trustees and one black trustee for the end-of-term vacancies which occurred in 1972, 1976, 1980, and 1984. For intra-term vacancies, the appointments have always been white trustees.

[5] 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954).

[6] In 1962, Judge Wisdom, writing for our Court, ordered the University of Mississippi to admit a black transfer student named James Meredith. *Meredith v. Fair*, 305 F.2d 341 (5th Cir.1962). Meredith was a student at Jackson State College when he applied for admission to the University of

admission of Meredith, no black students attended any of the historically white universities and no white students attended any of the historically black universities. The historically white universities were: (1) the University of Mississippi; (2) Mississippi State University; (3) the University of Southern Mississippi; (4) Mississippi University for Women; and, (5) Delta State University. The historically black universities were what are now known as (1) Jackson State University; (2) Alcorn State University; and, (3) Mississippi Valley State University.

At the time of the *Meredith* decision, the Board had implemented segregative policies encompassing: (1) student enrollment; (2) the maintenance of branch centers by the historically white universities in close proximity to the historically black universities; (3) the employment of faculty and staff; (4) facility provision and condition; (5) the allocation of financial resources; (6) academic program offerings; and, (7) the racial composition of the Board and its staff.[7] The Board did not permit black students to enroll at any of the historically white universities

Mississippi in January, 1961. He sought transfer because he found Jackson State College to be substandard. The University of Mississippi denied his admission application and in response Meredith filed suit in federal district court. Judge Wisdom wrote: "[t]he efforts of the Board of Trustees [of the State Institutions of Higher Learning] and the officials of the University of Mississippi together with various state officials, including the Governor and the Lieutenant Governor of the state of Mississippi, and the Mississippi Legislature to impede and deter efforts to integrate the student body at the University of Mississippi during the 1961-62 school year are well documented."

[7] *Ayers*, 674 F.Supp. at 1551.

under its auspices.[8] The years each of the historically white universities first enrolled a black student are as follows:

University of Mississippi	1962
Mississippi State University	1965
Mississippi University for Women	1966
University of Southern Mississippi	1967
Delta State University	1966

Similarly, white students did not attend a historically black university until the late 1960's:

Alcorn State University	1966
Jackson State University	1969
Mississippi Valley State University	1970

The racial identification of Mississippi's public universities continues to the present day. Undergraduate programs included the following percentages of black enrollment between the years 1973-74 and 1985-86:

	1973-74	1980-81	1985-86
Historically White Institutions [9]			
Delta State University	14.3	17.1	17.59
Mississippi State University	5.6*	11.2	11.0
Mississippi University for Women	9.9	19.3	18.0
University of Mississippi	3.5	7.0	5.9
University of Southern Mississippi	4.5	11.3	14.24
Historically Black Institutions			
Alcorn State University	99.7	96.9	95.6
Jackson State University	99.6	95.2	91.9
Mississippi Valley State University	99.7	99.8	99.3

[8] *Id.* at 1529.

[9] * The figure for Mississippi State University for 1973-74 is an average derived from 1972-73 and 1974-75 data because data for 1973-74 are not available.

The racial composition of the graduate programs reflects a similar pattern.

	1973-74	1980-81	1985-86
Historically White Institutions [10]			
Delta State University	41.6	38.3	26.2
Mississippi State University	12.8**	9.6	8.0
Mississippi University for Women	14.5	18.0	13.0
University of Mississippi	7.6	8.4	7.5
University of Southern Mississippi	9.2**	8.7	8.1
Historically Black Institutions			
Alcorn State University	0	99.4	96.0
Jackson State University	91.8	85.3	59.0**
Mississippi Valley State University	0	94.7	96.7

In summary, regarding undergraduate enrollment in 1986, over 99% of the white students (26,759 out of 26,953) were enrolled in historically white institutions and over 71% of the black students (9,125 out of 12,826) were enrolled in historically black institutions.

B. *Admissions Policies*

The historically white institutions require all applicants to achieve a minimum score of 15 on the ACT, a standardized college admissions examination, as a prerequisite for admission. The Board instituted this policy soon after the court ordered admission of James Meredith to the University of Mississippi in 1962 because it deterred black enrollment.[11] At the time, the average ACT score for white Mississippi

[10] ** In 1985-86, Jackson State University enrolled 59% black, 13.3% white, and 27.7% other-race pupils. For 1973-74, Mississippi State University and the University of Southern Mississippi are averages of 1972-73 and 1974-75 data because 1973-74 data are not available.

[11] *Ayers*, 674 F.Supp. at 1555.

students was 18 while the average for black Mississippi students was 7.

In 1976, the Board augmented the ACT requirement requiring a minimum score of 9 for admission to any of Mississippi's public universities ostensibly in response to complaints voiced by university faculty and staff regarding the preparation of incoming freshmen. This ACT minimum was directed at the historically black schools. The three largest historically white schools maintained the 15 ACT minimum.

The Board again modified admission requirements in 1977 and in 1982. In 1977, the Board created an exception to the 9 point ACT minimum. Students with ACT scores of 9 or above could be admitted to the historically white schools if they fell into a special talents or high risk category. And as of 1982, the Board required high school graduates to complete a group of college preparatory courses as an admissions prerequisite.

The college preparatory course requirement applies to all of Mississippi's public universities but the ACT exception is more liberal at the historically black institutions. The historically white institutions may enroll a number of students not to exceed five percent of the previous academic year's freshmen class under the talented or high risk exception.[12] At

[12] The record suggests that the availability of the high risk exceptions at the historically white schools were not well publicized in their recruiting materials. The president of the University of Southern Mississippi testified that he was reluctant to advertise the existence of the exceptions, and that the University of Southern Mississippi did not encourage applicants with less than 15 on the ACT to apply. Students with scores below 15 were automatically rejected. Their record was then reviewed at a later time in the spring or summer to determine if a department had requested a particular student's admission.

The other historically white schools do not appear to admit large numbers of students with ACT scores below 15. In 1986, applicants with less than a 15 composite score on the ACT accounted for approximately nine percent of the entering class at Delta State University; approximately five percent at Mississippi State University; approximately four percent at the University of Mississippi, and zero percent at Mississippi University for Women. In contrast, over 50% of the freshmen admitted to each of the historically black institutions that year scored less than 15 on the ACT.

Jackson State University, however, the limit is eight percent and at Alcorn State University and Mississippi Valley State University the limit is ten percent.

Apart from the ACT exception, the prerequisites for admission to Mississippi's public universities are thus the completion of a core curriculum in high school and a minimum score on the ACT which varies with the institution. Presently, the minimum score is 15 at the historically white institutions and 13 at the historically black institutions.[13] Completion of these requirements allows automatic admission.

However, the organization that developed the ACT, the American College Testing Program, advises colleges to use the ACT in conjunction with other considerations so that a whole picture of a student can be assessed rather than one based solely on a standardized test. In the case of minority candidates, the American College Testing Program stresses the inadequacy of the ACT score as the sole criterion for admission:

[13] In 1985-86, roughly 7 of 10 white high school graduates and 3 of 10 black high school graduates scored 15 or higher on the ACT.

> Because many factors (e.g., socioeconomic status, differences in educational opportunities, culture, etc.) can potentially affect the test performance of many students who are members of minority groups, ACT believes that assessment for the purpose of college admissions should reflect as complete a picture as possible of students and should include other information in addition to test scores. . . . *In the case of minority students whose prior educational opportunities have been limited, it becomes especially appropriate to make use of the total scope of information—cognitive as well as non-academic—provided by the ACT assessment.*[14]

Moreover, ACT policies state that "investigation[s] of differential validity for sub-groups of . . . minority/non-minority [applicants]" should be done where possible.[15] This type of admissions investigation refers to the effectiveness of ACT scores in predicting college success for black as opposed to white applicants. Apparently, ACT score data should not be used as the sole criterion for admission/selection decisions especially regarding minority candidates. It is thus no surprise that ACT provides without charge, materials allowing a more accurate selection of individual students utilizing high school grades. The state universities of Mississippi, however, continue to consider only the single ACT score to define the automatic admission pool.

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[14] Board exhibit 186 at 6-7 (emphasis added).

[15] Plaintiff exhibit 350.

C. *The Relative Composition of the Faculties*

Mississippi's public universities had the following percentages of black faculty in 1985-86: [16]

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[16] Only 60 of the 2,563 faculty employed by the historically white institutions during the 1985-86 school year were black. Yet Dr. Lucious Williams, Assistant Vice Chancellor for Academic Affairs, maintained that the University of Mississippi, from about 1983-86, kept a minority faculty vita bank with about 200 vita on file on an annual basis.

There also appears to be a disparity between the extent of the faculty's education at the historically white institutions and the historically black institutions:

Historically White Institutions*

	Total	% Full Professors	% Instructors	% with Doctorate
UM	673	25.9%	24.4%	59.0%
MSU	895	42.8	6.5	70.0
USM	675	26.4	12.9	64.4
DSU	203	32.0	20.7	52.7
MUW	129	35.7	14.0	52.7

Historically Black Institutions**

	Total	% Full Professors	% Instructors	% with Doctorate
JSU	359	22.6%	16.7%	64.9%
ASU	174	10.9	43.1	46.6
MVSU	138	18.8	21.7	42.0

* The acronyms for the historically white institutions are: (1) UM for the University of Mississippi; (2) MSU for Mississippi State University; (3) USM for the University of Southern Mississippi; (4) DSU for Delta State University; and (5) MUW for Mississippi University for Women

** The acronyms for the historically black institutions are: (1) JSU for Jackson State University; (2) ASU for Alcorn State University; and, (3) MVSU for Mississippi Valley State University

Historically White Institutions:

University of Mississippi	1.5%
Mississippi State University	2.3
University of Southern Mississippi	2.4
Mississippi University for Women	1.9
Delta State University	5.0

Historically Black Institutions:

Jackson State University	67.3%
Alcorn State University	67.9
Mississippi Valley State University	73.5

Similar to racial composition, the variation in faculty salaries between the historically white institutions and the historically black institutions is vast.[17]

Historically White Institutions:

	1979-80	1986-87
University of Mississippi	$20,794	$30,757
Mississippi State University	21,153	31,957
University of Southern Mississippi	19,817	31,964
Mississippi University for Women	17,836	26,507
Delta State University	17,265	26,213

Historically Black Institutions:

	1979-80	1986-87
Jackson State University	$18,047	$26,669
Alcorn State University	16,019	21,291
Mississippi Valley State University	15,546	22,746

The district court justified the disparities in racial composition by referring to the shortage of qualified minority applicants for faculty positions.[18] For example, a statistic cited by the district court indicates that from 1977 to 1982, out of 1,067 Ph.D.'s awarded in chemical engineering in the United States, only 6 or less than one percent were awarded to blacks; out

[17] United States exhibit 694 (q).

[18] *Ayers*, 674 F.Supp. at 1563.

of 1,679 Ph.D.'s awarded in electrical engineering, only 29 or less than two percent were awarded to blacks; and in European history, a field included within the social sciences where blacks are generally best represented, out of 1,165 Ph.D.'s only six or less than one percent were awarded to blacks.[19] Moreover, the district court continued, both businesses and other educational institutions compete for the number of blacks with terminal degrees.[20]

The district court's explanation cannot, however, be understood without reference to the Board's 1974 Plan of Compliance (the "Plan"). In the late 1960's, the United States Department of Health, Education, and Welfare ("HEW") requested the State of Mississippi and the Board of Trustees to submit a proposal to desegregate Mississippi's university system. The Board responded by submitting the Plan in 1974. The objective of the Plan was to increase the enrollment and employment of minorities at the public universities of Mississippi. The Plan made projections for minority student enrollment and faculty and administration employment for the years 1973-81.

Significantly, the Plan accounted for matters that the district court found to excuse the Board's failure to hire more minority faculty. The Plan stated that "[t]he projections in regard to faculties of [the historically white institutions] take into account the limited supply of qualified black faculty. Institutions of higher learning throughout the nation, as well as business and industry, are vigorously seeking well-trained and highly qualified black employees."[21] The

[19] *Id.* at 1537.

[20] *Id.* at 1538.

[21] United States Exhibit 1 at page 12.

legislature, however, always under-funded the Plan. Predictably, the Plan did not change the racial composition of the respective faculties or administrations.[22]

D. *Institutional Mission and Academic Programs*

In 1980, the Board began to review all non-doctoral programs to define the role and scope of its public universities. The resulting "mission statements" classified the universities into three categories for funding purposes: comprehensive, urban, and regional. The Board designated Mississippi State University, the University of Mississippi, and the University of Southern Mississippi, historically white institutions, as comprehensive universities. The comprehensive designation meant that these institutions offered a greater number and higher level of degree programs than did the remaining universities and that each institution was expected to offer a number of programs on the doctoral level but not in the same disciplines.

[22] One objective of the Plan was to increase the employment of black administrators. At the historically white institutions, six of the 393 administrators (1.5%) were black at the time of the Plan. In 1983, nine years after the Plan was enacted, the percentage of black administrators for each institution was as follows:

Historically White Institutions:	
University of Mississippi	2.9%
Mississippi State University	0.7%
University of Southern Mississippi	2.0%
Mississippi University for Women	0.0%
Delta State University	0.0%
Historically Black Institutions:	
Jackson State University	94.1%
Alcorn State University	96.7%
Mississippi Valley State University	92.5%

Moreover, in 1986, at the highest administrative levels, the historically white institutions reported 22 officers, who were all white, despite a turnover of 15 positions since 1981. The historically black institutions had nine black officers and one white officer.

The only university designated "urban" was Jackson State. Jackson State's role is the service of the urban community, that is, the City of Jackson. Alcorn State University, Delta State University, Mississippi University for Women, and Mississippi Valley State University received the regional designation. The regional designation signifies a more limited programmatic focus. The Board expects each regional institution to restrict course offerings to undergraduate instruction.

1. *Program Offerings*

The Plan listed the programs available as of 1973-74:

Historically White Institutions [23]

	Bachelors	Masters	Specialist	Doctoral	Other	Total
UM	62	45	7	28	0	142
MSU	94	68	18	45	0	225
USM	108	73	27	37	0	245
MUW	37	14	9	0	1	62
DSU	34	13	4	0	0	51
Historically Black Institutions						
ASU	28	0	0	0	0	28
JSU	38	23	1	0	0	62
MVSU	26	0	0	0	1	27

The statistics indicate that the three white comprehensive universities offered more programs than the

[23] *See supra* note 16 for the meaning of the acronyms.

historically black universities. The historically black universities offered only 6.2% or 24 of the 388 graduate programs. The white comprehensive universities offered all 110 doctoral programs. Alcorn State University and Mississippi Valley State University were limited to undergraduate instruction. As of 1986, although change had occurred, this pattern of program offerings remained discernable. The schools ranked as follows regarding total programs offered:

	Total Programs
Mississippi State University	151
University of Mississippi	138
University of Southern Mississippi	124
Jackson State University	73
Delta State University	57
Alcorn State University	39
Mississippi University for Women	27
Mississippi Valley State University	17

No historically black institution in 1981 or 1986 offered a professional degree in programs such as law, medicine, dentistry, or pharmacy. The historically black institutions, on average, offered fewer graduate programs and fewer fields of study than did the historically white schools, and, had a smaller number of their programs accredited.[24]

[24] Disparities in program offerings between the historically black institutions and the historically white institutions continued to exist in 1985 and 1986 despite the promise of the Plan to give the historically black institutions priority for new programs. From 1975-86, the historically black institutions ranked lowest in the number of new programs approved by the Board:

Mississippi State University	22
Mississippi University for Women	17

[Continued]

[24] [Continued]

University of Southern Mississippi	16
Jackson State University	15
Delta State University	15
University of Mississippi	14
Mississippi Valley State University	6
Alcorn State University	2

Although an institution's refusal or failure to request new programs could affect these rankings, they suggest that the Board did not make an affirmative effort to place new programs at the historically black universities.

In 1986, the institutions ranked as follows among other criteria:

	Historically White Institutions					Historically Black Institutions		
Criteria	UM	MSU	USM	DSU	MUW	JSU	ASU	MVSU
Number of Bachelor Programs	3	1	2	4	7	5	6	8
Number of Graduate Programs	1	2	2	5	7	4	6	7
Total Programs	2	1	3	5	7	4	6	8
Fields-Bachelors	2	2	1	4	6	5	6	8
Fields-Masters	2	3	1	5	7	4	5	7
Fields-Doctorate	1	3	2	4	—	4	—	—
Library Volumes	3	2	1	6	5	4	7	8
Percentage of Faculty with Doctorate	2	1	4	3	7	5	5	8
Percentage of Faculty with Degree from Research University	1	2	4	5	8	3	6	6
Average ACT Score	1	2	5	4	2	7	5	8

See supra note 16 for the meaning of the acronyms.

2. *Program Duplication*

After the 1980 review, the Board ordered a substantial decrease in degree programs at both the historically black and the historically white institutions. These reductions affected the unnecessary program duplication existing between the universities. Unnecessary duplication refers to the duplication of programs considered nonessential to a liberal arts education.[25]

The historically white institutions, however, continue to unnecessarily duplicate programs offered at the historically black institutions. At the bachelors level, the historically white institutions unnecessarily duplicated 34.6% of the 29 programs offered by the historically black institutions as of 1985-86.[26] At the masters level, the historically white institutions unnecessarily duplicated nine of ten programs offered by the historically black institutions during the same period.[27]

The figures remain approximately the same when the white comprehensive universities are compared to the historically black universities. The district court found that the white comprehensive universities duplicated 32.7% of the programs offered by the historically black universities.[28] And at the masters level, the white comprehensive universities unnecessarily duplicated 86.2% of the program offered by the historically black universities.[29]

[25] In contrast, necessary duplication refers to the idea that every campus needs to teach basic courses fundamental to a proper education. Core subjects such as English, Mathematics, and History are thus not counted in determining "unnecessary" program duplication.

[26] *Ayers*, 674 F.Supp. at 1541.

[27] *Id.*

[28] *Id.*

There is also unnecessary duplication between the white comprehensives and Jackson State, the historically black institution with the urban designation. In 1986, Mississippi State University, the University of Mississippi, and the University of Southern Mississippi, each unnecessarily duplicated over 30% of the bachelor's level programs at Jackson State, including degree programs in such fields as Banking and Finance, Social Work, and Law Enforcement.

Moreover, a considerable amount of unnecessary duplication among the black and white universities remains even if duplication between the comprehensive and noncomprehensive universities is eliminated from the analysis. Thirty-eight percent of the bachelor's level programs at Mississippi Valley are unnecessarily duplicated at Delta State, including degree programs in such fields as Business Management and Administration and Law Enforcement.

3. *Off Campus Offerings*

The historically white universities opened three off-campus centers in Jackson, Natchez, and Vicksburg, Mississippi near Jackson State University and Alcorn State University during the 1950's and 1960's. The historically white universities' placement of these centers in close proximity to the historically black universities was one aspect of the racially dual system of higher education in Mississippi existing at the time the University of Mississippi was forced to admit James Meredith.[30] In Jackson, the University

[29] *Id.*

[30] *Id.* at 1551.

of Mississippi, Mississippi State, and the University of Southern Mississippi began offering courses at off-campus centers, located near Jackson State University, with the Board's permission, in 1951, 1961, and 1964 respectively. The three centers merged into what is presently the Mississippi University Center (the "University Center") in Jackson in 1966. The Board granted permission to grant degrees in 1972. As of 1981, seventy-six percent of the bachelors degree programs and 90% of the masters degree programs at Jackson State University were also offered at the University Center. Currently, however, Jackson State University enjoys on-campus privileges at the University Center and retains veto authority over all programs offered.[31] The historically white universities offer only limited graduate programs and unique courses.[32]

In 1962, the University of Southern Mississippi opened a resident center, the Natchez Center, approximately 40 miles from Alcorn State University.[33] The Center initially offered three years of undergraduate work, but the Board subsequently authorized the award of baccalaureate degrees in elementary and secondary education and business administration. These degrees were also offered by Alcorn State.[34] As of 1981, the Natchez Center offered twenty percent of the bachelors degree programs and 66% of the masters degree programs available at Alcorn State. At present, the University of Southern Mississippi

[31] *Id.* at 1542.

[32] *Id.*

[33] *Id.*

[34] *Id.*

offers only noncredit extension courses at the Natchez Center.

Mississippi State University opened the Vicksburg Center in 1952. The center offered courses for local school teachers. In 1979, the Board authorized Alcorn State to offer several courses at the Vicksburg Center. A consortium arrangement between the two schools was approved the next year.

E. *Funding*

The legislature annually appropriates funds to Mississippi's public universities for basic educational and operating activities. The Board applies a formula to this appropriation to determine the level of support for each institution. The variables in the formula include the number of student credit hours for the previous year, field and level of instruction, and the Board-designated mission of the university. Under this formula, the comprehensive universities receive the most funds per student credit hour; the regional universities receive the least; and Jackson State, the urban university, falls in the middle.

Historically, the Board under-funded the black institutions to maintain a racially segregated system.[35] As a result, the historically white institutions received and spent more money on a per student basis.[36]

[35] *Meredith* took judicial notice of this practice in 1962. *Id.* at 1551.

[36] Dr. Larry Leslie, the U.S. expert on funding, testified that the predominantly white institutions receive and spend more money on a per student basis. Dr. Leslie's analysis included revenues generated by more recent Board policies and practices which the district court found more favorable to the historically black institutions.

Average Total Education and General Income Per Student

	1960	1980	1986
Historically White Institutions	$1,368	$5,547	$8,934
Historically Black Institutions	$ 699	$4,354	$6,171

Average Total Education and General Expenditures Per Student

	1960	1980	1986
Historically White Institutions	$1,351	$5,412	$8,516
Historically Black Institutions	$ 718	$4,310	$6,038

These long term disparities in funding created an accumulated deficit to the disadvantage of the historically black institutions. The funding formula employed by the Board does not, however, account for the historical disparity. Disparities in funding result from the designation of an institution as regional, urban, or comprehensive, with the latter receiving the most funds. But, as the district court stated, the three historically white institutions received the comprehensive designation in 1981. Channeling the most money to the comprehensive institutions thus perpetuated the discriminatory funding practices rebuked by this Court as de jure in 1962.[37]

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[37] *Ayers*, 674 F.Supp. at 1551.

F. *Facilities*

the district court found that the quality of an institution's facilities affects the administration of its academic programs and its attractiveness to students. From 1964-65 to 1984-85, fulltime enrollment in Mississippi's universities nearly doubled. The district court stated that Mississippi's response to this increase was inconsistent in the early years because the historically white institutions received a disproportionate share of the funds allocated for facility expansion.[38] In addition, the district court did not find any correlation between the racial identity of the institutions and the amount of campus space or the quality of the particular institutions' facilities.[39]

The district court's findings appear predicated on the testimony of the defendant's expert, who limited his analysis to the amount of space at each of the universities[40] and to the physical conditions of the facilities. The district court did not, however, determine whether the additional funds spent for facilities at the historically black institutions in recent years changed their character since the *Brown* decision in 1954 when they were considered inferior to the historically white institutions.[41]

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[38] *Id.* at 1547.

[39] *Id.* at 1561-62.

[40] *Id.* at 1548-50. The district court focused on square footage per student. *Id.* This measure, however, does not account for the quality, usefulness, efficiency, or, perhaps most importantly, the aesthetics of a structure. A large warehouse with concrete floors and tin walls may have the same square footage as the British Museum but that does not give the two facilities the same potential to pleasurably exhibit art.

[41] *Id.* at 1549.

Funds bought more in the earlier years when more money was spent for the white institutions' facilities. According to trial testimony, this funding disparity means that the space at the black institutions was not "a" generous and lacked the ambiance of the white institutions. Thus the replacement values, the cost of replacing a facility, is useful in determining whether disparities in funding currently exist between the two types of institutions. The replacement values at the historically white institutions still exceed the replacement values at the historically black institutions:

	1964-65	1984-85	1964/65-1984/85
Historically Black Institutions			
ASU	$ 10,701,096	$ 49,915,240	$ 39,214,144
JSU	12,242,349	74,315,678	62,073,329
MVSU	12,229,539	43,837,040	31,607,501
Total	35,172,984	168,067,958	132,894,974
Historically White Institutions			
DSU	$ 11,992,239	$ 63,169,993	$ 51,177,754
MSU	62,245,953	305,721,970	243,476,017
MUW	22,434,678	63,485,898	41,051,220
UM	48,405,525	199,526,432	151,120,907
USM	44,143,743	120,193,938	76,050,195
Total	189,222,138	752,098,231	562,876,093

II. THE DECISION BELOW

The scope of a state's duty to eliminate the effects of former de jure segregation in its public universities remains in question. The answer rests upon an interpretation of the Supreme Court's decision in *Green*

v. School Board of New Kent County.[42] The standard implemented by the *Green* Court places an affirmative duty on states to eliminate all of the "vestiges" or effects of de jure segregation "root and branch."[43] One line of authority has applied this standard in the university context. *Norris v. State Council of Higher Education*, 327 F.Supp. 1368 (E.D.Vir.1971) aff'd per curiam sub nom. *Board of Visitors of the College of William and Mary in Virginia v. Norris*, 404 U.S. 907, 92 S.Ct. 227, 30 L.Ed.2d 180 (1971); *Geier v. Alexander*, 801 F.2d 799 (6th Cir.1986); *U.S. Louisiana*, 692 F.Supp. 642 (E.D.La.1988); *Sanders v. Elligton*, 288 F.Supp. 937 (M.D.Tenn.1968).

In the present case, however, the district court applied a different standard based on an alternative reading of *Green*. This standard requires a state to implement, in good faith, race neutral policies and procedures[44] instead of uprooting the vestiges of segregation root and branch. The district court derived this standard from two decisions: The Supreme Court's per curiam affirmance of a three judge district court in *Alabama State Teachers Association v. Alabama Public School and College Authority*, 289 F.Supp. 784 (M.D.Ala.1968), aff'd per curiam, 393 U.S. 400, 89 S.Ct. 681, 21 L.Ed.2d 631 (1969) (Douglas, J., dissenting)[45] and the opinion of a five member majority in *Bazemore v. Friday*, 478 U.S. 385, 106 S.Ct. 3000, 92 L.Ed.2d 315 (1986).

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[42] 391 U.S. 430, 88 S.Ct. 1689, 20 L.Ed.2d 716 (1968).

[43] *Id.* at 438, 88 S.Ct. at 1694.

[44] *Ayers*, 674 F.Supp. at 1554.

[45] In a footnote in his dissent, Justice Douglas stated that the district court's rationale that the duty to desegregate a university system should be more narrow than the duty to

The district court in *Alabama State Teachers Association* ("*ASTA*") distinguished between higher education and secondary and elementary education.[46] The *ASTA* court reasoned that the scope of the state's duty in the face of former de jure segregation should be based on the relatively narrow good faith standard because in the area of higher education, students themselves choose where to attend college in contrast to elementary and secondary school where attendance is compulsory.[47] In the present case, the district court found support for *ASTA*'s distinction between choice in higher education and compulsory attendance in secondary and elementary education in the Supreme Court's decision in *Bazemore v. Friday*.[48]

Bazemore, in part, involved a challenge to the racial composition of the North Carolina Extension Service 4-H and Homemakers clubs. These clubs were segregated by law prior to 1965. The Court held that the existence of single race 4-H and Homemaker clubs did not violate the equal protection clause even though the clubs had a history of de jure segregation.[49] The Court reached this holding because the state had adopted a policy permitting potential members to choose which club to join in response to the Civil

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desegregate an elementary school system "is on its face an amazing statement as the forerunners of *Brown v. Board of Education*. . . . were cases involving higher education. *See Missouri ex rel. Gaines v. Canada*, . . . *Sweatt v. Painter*, . . . [and] *McLaurin v. Oklahoma State Regents for Higher Education*."

[46] *ASTA* 289 F.Supp. at 788.

[47] *Id.*

[48] 478 U.S. 385, 106 S.Ct. 3000, 92 L.Ed.2d 315 (1986).

[49] *Id.* at 407-09, 106 S.Ct. at 3012-13.

Rights Act of 1964.[50] The heart of the Court's five paragraph opinion was based on a comparison to *Green*.

> *Green* . . . held that voluntary choice programs in the public schools were inadequate and that the schools must take affirmative action to integrate their student bodies. It was the effective predicate for imposing busing and pupil assignment programs to end dual school systems, but it has no application to the voluntary associations supported by the Extension Service. Even if the service in effect assigned blacks and whites to separate clubs prior to 1965, it did not do so after that time. While schoolchildren must go to school there is no compulsion to join 4-H or Homemaker Clubs; and while School Boards customarily have the power to create school attendance areas and otherwise designate the school that particular students may attend, there is no statutory or regulatory authority to deny a young person the right to join any club he or she wishes to join . . . . And however sound *Green* may have been in the context of public schools, it has no application to this wholly different milieu.[51]

Bazemore thus distinguished the compulsory attendance requirement of the elementary and secondary schools at issue in *Green* from the voluntary membership characteristic of the 4-H and Homemaker clubs. The distinction is predicated on student choice.

The district court used this distinction to analogize the choice facing the students of the public universities of Mississippi in the present case to the choice

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[50] *Id.*

[51] *Id.* at 408, 106 S.Ct. at 3013.

facing the students who wished to join 4-H and Homemaker clubs in *Bazemore*. The students in *Bazemore* could choose which 4-H or Homemaker club to join and the students in the present case could choose which Mississippi public university to attend.[52] The district court thus held that under the free choice distinction created in *ASTA* and supported by *Bazemore*, Mississippi did not violate the equal protection clause. The court reached this holding because Mississippi enacted an open admissions policy similar to the free choice policy enacted by North Carolina in *Bazemore*.

III. THE LAW

A. *The Geier Decision*

We reject the district court's reading of *Green* and adopt the interpretation applied by the Sixth Circuit in *Geier v. Alexander*.[53] The *Geier* court held that a state has an affirmative duty to eliminate all of the "vestiges" or effects of de jure segregation, root and branch, in a university setting.[54] The searching inquiry demanded by *Geier* implies that the federalism and separation of powers concerns involved in finding a state actor liable under the equal protection clause will not prevent a federal court from demanding unitary status in a public university system. This reading of *Green* punctuates our constitutional mandate to uproot the entrenched results of racial subjugation. The evolution of cases from *Plessy v. Ferguson*[55] to *Brown v. Board of Education*[56] requires no less.

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[52] *Ayers*, 674 F.Supp. at 1553.

[53] 801 F.2d 799 (6th Cir.1986).

[54] *Id.* at 804.

[55] 163 U.S. 537, 16 S.Ct. 1138, 41 L.Ed. 256 (1896).

[56] *Id.* at 804.

Our endorsement of the *Geier* Court's rationale is, however, limited. The *Geier* Court, in deciding to apply *Green* in the public university forum, distinguished *Bazemore*. The Court stated that:

> While membership in 4-H and Homemaker Clubs offers a valuable experience to young people and families, particularly in rural areas, it cannot be compared to the value of an advanced education. The importance of education to the individual and the interest of the state in having its young people educated as completely as possible indicate clearly that the holding in *Green* rather than that of *Bazemore* applies. . . . Nothing in the *Bazemore* decision, where the compelling interest of a state in the education of its citizenry was not involved, requires us to reexamine these holdings [*Green* or *Geier v. University of Tennessee*] [57]

This rationale for distinguishing *Bazemore* is sound to the extent it suggests that *Bazemore* is factually distinguishable from cases involving the effects of de jure segregation in public universities. The *Bazemore* majority stated that:

> [t]he district court could find no evidence of any discrimination since that time [the time the open admissions policy was enacted] in either the services or membership and concluded as a matter of fact that any racial imbalance existing in any of the clubs was the result of wholly voluntary and unfettered choice of private individuals.[58]

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[57] *Id.* at 805; *See Green* 391 U.S. at 430, 88 S.Ct. at 1689 and *Geier v. University of Tenn.*, 597 F.2d 1056 (6th Cir. 1979).

[58] *Bazemore*, 478 U.S. at 407, 106 S.Ct. at 3012.

The outcome in *Bazemore* may thus rest on the absence of evidence of discrimination. In contrast, the record in the present case is replete with the disease. The Court in *Bazemore* only examined an arm, the 4-H and Homemakers clubs, of the body that is the North Carolina university system. This macro-view did not call the Court to the operating table although a micro-view of the case before us, which reveals that the public universities of Mississippi are infected throughout, might prompt major surgery.

We cannot, however, agree with the *Geier* rationale to the extent it suggests that potential members of 4-H and Homemaker clubs are any less stigmatized than university students by the stereotypes of racial inferiority conveyed through the effects of de jure segregation. The *Geier* court justified the holding in *Bazemore* by arguing that the state's interest in higher education outweighed the value of the experience provided by membership in 4-H and Homemaker clubs.[59] This argument, that a state's duty to eradicate the effects of de jure segregation depends on the importance that the public places on a particular activity, would require this court to create a hierarchy of values at odds with the moral choices inherent in the forerunners of *Green: McLaurin, Sweatt,* and *Brown.*[60] These cases demonstrate that law should be

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[59] *Geier,* 801 F.2d at 805.

[60] *Missouri ex rel. Gaines v. Canada,* 305 U.S. 337, 59 S.Ct. 232, 83 L.Ed. 208 (1938); *McLaurin v. Oklahoma State Regents for Higher Educ.,* 339 U.S. 637, 70 S.Ct. 851, 94 L.Ed. 1149 (1950); *Sweatt v. Painter,* 339 U.S. 629, 70 S.Ct. 848, 94 L.Ed. 1114 (1950); *Brown,* 347 U.S. at 483, 74 S.Ct. at 686. Similarly, we disagree with the three judge district court in *United States v. Louisiana,* 692 F.Supp. 642, 656 (E.D.La. 1988) to the extent, and only to the extent, it borrowed this portion of the *Geier* analysis to distinguish *Bazemore.*

society's mirror casting reflections of individual dignity upon all.

B. *The Evolution of Plessy to Brown*

The values embodied in *Brown* provide the foundation for the searching inquiry demanded by *Green* in the public university forum. The *Brown* Court's rubric, that separate is inherently unequal, symbolizes the need for a rule of law to serve as a moral ambition in a society fraught with discrimination. *Brown,* however, cannot be understood in isolation. A visit with its ancestors, *Plessy v. Ferguson, Missouri ex rel. Gaines v. Canada, Sweatt v. Painter,* and *McLaurin v. Oklahoma* is necessary.[61]

Plessy was an action brought by a black man desiring to sit in a railway car designated for whites only under Louisiana law. The Court held that Louisiana's racially segregative law did not violate the fourteenth amendment.[62] In response to Mr. Plessy's argument, that separate facilities stamped him with a badge of racial inferiority, the Court stated:

> We consider the underlying fallacy of the plaintiff's argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act but solely because the colored race chooses to put that construction upon it. . . . The

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[61] *Plessy,* 163 U.S. at 537, 16 S.Ct. at 1138; *Missouri ex rel. Gaines,* 305 U.S. at 337, 59 S.Ct. at 233; *Sweatt,* 339 U.S. at 629, 70 S.Ct. 848; *McLaurin,* 339 U.S. at 637, 70 S.Ct. at 851.

[62] *Plessy,* 163 U.S. at 550, 16 S.Ct. at 1143.

argument also assumes that social prejudices may be overcome by legislation, and that equal rights cannot be secured to the negro except by an enforced commingling of the two races. We cannot accept this proposition. If the two races are to meet upon terms of social equality, it must be the result of natural affinities, a mutual appreciation of each other's merits and a voluntary consent of individuals. . . . *Legislation is powerless to eradicate racial instincts.*[63]

Plessy is clearly at odds with the history surrounding the fourteenth amendment.

> The defeat of the South in the Civil War brought forth the Second Revolution in America's history, a turbulent era referred to as Reconstruction. Black participation in Southern public life after 1867 was the most radical development of the Reconstruction years, *a massive experiment in interracial democracy* without precedent in the history of this or any other country that abolished slavery in the nineteenth century. . . . *The transformation of slaves into* free laborers and *equal citizens* was the most dramatic example of the social and political changes unleashed by the Civil War and emancipation. . . . Reconstruction was not merely a specific time period, but the beginning of an extended historical process: *the adjustment of American society to the end of slavery.*[64]

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[63] *Id.* at 551, 16 S.Ct. at 1143 (emphasis added).

[64] E. Foner, *Reconstruction—America's Unfinished Revolution 1864-1877* xxv-xxvii (1988) (emphasis added).

The Civil War altered the mores of our country. Blacks were to be equal to whites. The fourteenth amendment, enacted one year later, was the embodiment of this idea of equality clothing blacks, for the first time, with the fabric of the Constitution.

The *Plessy* Court abandoned its constitutional duty to influence the folkways of the South to comport with the mores now enshrined in the fourteenth amendment; mores irreconcilable with the separate but equal rule announced by the Court. This rule reinforced the social stigmatization of blacks with racial separation by force of law. Stereotypes of racial inferiority were perpetuated by galvanizing instead of transforming the perception that whites are superior. The Court stated that it was the perceptions of blacks that created any badges of inferiority when in fact it was Mr. Plessy who was imploring the Court to bridle the racial beliefs of the white majority that he so painfully endured.

Plessy is thus a decision that maintains the status quo perceptions of a prejudiced society. The Court failed to begin to bring these perceptions in line with the message of the Civil War that blacks were equal to whites. The constitutional rights of the minority did not animate the Court's analysis.

The constitutional rights of blacks began to expand in part through the notion that discrimination law should serve as a symbol to influence majority values. *Missouri ex rel. Gaines v. Canada.*[65] In *Gaines*, the University of Missouri School of Law denied Lloyd Gaines, the plaintiff, admission because he was black. The University informed him that he could attend another institution in an adjacent state at Missouri's

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[65] 305 U.S. 337, 59 S.Ct. 232.

expense. Instead, Gaines sued the state for admission.

The Supreme Court held that Gaines had to be admitted to the School of Law. The Court reasoned that:

> The basic consideration is not as to what sort of opportunities, other States provide, or whether they are as good as those in Missouri, but as to what opportunities Missouri itself furnishes to white students and denies to negroes solely upon the ground of color . . . . [I]t would nevertheless be the constitutional duty of Missouri when it supplied such courses [in legal education] for white students to make equivalent provision for negroes . . . . [T]he essence of a constitutional right is that it is a personal one. It is the individual who is entitled to the equal protection of the laws.[66]

The *Gaines* rationale differs significantly from the reasoning of *Plessy*. In *Gaines*, the Court placed an affirmative duty on the state to redress the constitutional rights of a black student. The Court considered these rights personal to the individual. Unlike the Court in *Plessy*, the analysis of the *Gaines* Court was thus animated by a concern for minority rights. This analysis suggests, moreover, that segregation law was beginning to empathize with the perceptions of blacks.

The eradication of the separate but equal doctrine, initiated by the *Gaines* Court, continued in two other cases involving university education, *Sweatt v. Painter*,[67] and *McLaurin v. Oklahoma State Regents*

[66] *Missouri ex rel. Gaines*, 305 U.S. at 349, 59 S.Ct. at 232.

[67] *Sweatt*, 339 U.S. at 629, 70 S.Ct. at 848.

for Higher Education.[68] The question presented in both cases was: "[t]o what extent does the Equal Protection Clause of the Fourteenth Amendment limit the power of a state to distinguish between students of different races in professional and graduate education in a state university?[69]

In *Sweatt*, the University of Texas School of Law denied admission to a prospective law student because he was black.[70] He sued the University and won admission.[71] In response, the University created a law school for black students in the basement of a state office building.[72] The black law school had a "faculty of five full time professors; a student body of 23; a library of some 16,500 volumes serviced by a full time staff; a practice court and a legal aid association; and one alumnus who ha[d] become a member of the Texas bar."[73]

The trial court found that the school offered "privileges, advantages and opportunities for the study of law substantially equivalent to those offered by the State to white students at the University of Texas."[74] The Supreme Court, however, rejected these findings. The Court stated that:

> we cannot find substantial equality in the educational opportunities offered white and Negro law

[68] *McLaurin*, 339 U.S. at 637, 70 S.Ct. at 851.

[69] *Sweatt*, 339 U.S. at 631, 70 S.Ct. at 849.

[70] *Id.*

[71] *Id.* at 631-32, 70 S.Ct. at 849.

[72] *Id.* at 632, 70 S.Ct. at 849.

[73] *Id.* at 633, 70 S.Ct. at 850.

[74] *Id.* at 632, 70 S.Ct. at 849.

> students by the state . . . . With such a substantial and significant segment of society excluded, we cannot conclude that the education offered petitioner is substantially equal to that which he would receive if admitted to the University of Texas Law School . . . . It is fundamental that these cases [addressing race distinctions in graduate education] concern rights which are personal and present.[75]

McLaurin was decided the same day as *Gaines*. G.W. McLaurin, a black student, applied to the University of Oklahoma to obtain a doctorate in education.[76] The University prohibited McLaurin from enrolling due to an Oklahoma statute forbidding the operation of a school attended by both blacks and whites.[77]

McLaurin sued the University for admission.[78] In response, the Oklahoma legislature amended the statute to admit black students under the condition that instruction "shall be given at such colleges or institutions of higher education upon a segregated basis." [79] Although the University admitted McLaurin under this amendment, he was

> required to sit apart at a designated desk in an anteroom adjoining the classroom; to sit at a designated desk on the mezzanine floor of the library, but not to use the desks in the regular reading room; and to sit at a designated table

[75] *Id.* at 634-35, 70 S.Ct. at 850-51.

[76] *McLaurin*, 339 U.S. at 638, 70 S.Ct. at 852.

[77] *Id.*

[78] *Id.*

[79] *Id.*

> and to eat at a different time from the other students in the school cafeteria.[80]

The three judge district court held that this treatment did not violate McLaurin's right to the equal protection of the laws.[81] The Supreme Court reversed. The Court reasoned that:

> [The restrictions] signify that the State, in administering the facilities it affords for professional and graduate study, sets McLaurin apart from the other students. The result is that appellant is handicapped in his pursuit of effective graduate instruction. Such restrictions impair and inhibit his ability to study, to engage in discussions and exchange views with other students, and, in general, to learn his profession. . . . There is a vast difference—a Constitutional difference—between restrictions imposed by the state which prohibit the intellectual commingling of students, and the refusal of individuals to commingle where the state presents no such bar. . . . [T]he removal of the state restrictions will not necessarily abate individual and group predilections, prejudices and choices. But at the very

[80] *Id.* at 640, 70 S.Ct. at 853. The University altered the conditions under which Mr. McLaurin attended school in the interval between the decision of the district court and the oral argument in the Supreme Court. The "section of the classroom in which appellant sat was surrounded by a rail on which there was a sign stating, 'Reserved for Colored,' but these have been removed. [At the time of oral argument, McLaurin was] assigned to a seat in the classroom in a row specified for colored students; he [was] assigned to a table in the library on the main floor; and he [was] permitted to eat at the same time in the cafeteria as other students, although here again he [was] assigned to a special table." *Id.*

[81] *Id.*

> least, the state will not be depriving appellant [McLaurin] of the opportunity to secure acceptance by his fellow students on his own merits. . . . We conclude that the conditions under which this appellant is required to receive his education deprive him of his personal and present right to the equal protection of the laws.[82]

The operative ideas in *Gaines* were brought to fruition by *Sweatt* and *McLaurin*. The rights of a black individual seeking admission to a white university labeled personal by the *Gaines* Court were considered the rights of a "significant and other segment of society" in *Sweatt*.[83] The *Sweatt* Court thus heeded the message of the Civil War by recognizing the rights of the black minority in their entirety. The implication is that blacks were entitled to complete participation in community life.

McLaurin developed a critical aspect of this idea by focusing on the intellectual experience of the black student. The Court stated that: "Such restrictions [i.e., the ones isolating McLaurin from the rest of the student body] impair and inhibit his ability to study, to engage in discussions and exchange views with other students, and, in general, to learn his profession."[84] Minority perceptions were at issue reflecting the Court's understanding that the majoritarian regime of separate but equal inflicted messages of inferiority. The reasoning of *McLaurin* thus differs from the reasoning of *Plessy* where the Court, condoning the status quo folkways of the white major-

[82] *Id.*

[83] *Sweatt*, 339 U.S. at 634, 70 S.Ct. at 850.

[84] *McLaurin*, 339 U.S. at 641, 70 S.Ct. at 853.

ity, stated that blacks imposed badges of inferiority upon themselves.

The *McLaurin* Court's most significant recognition, however, is the possibility of using equal protection doctrine to influence these folkways to correspond with the message of equality wrought by the Civil War. This possibility evolved from the duty placed on the state by the *Gaines* Court to redress minority rights. The Court in *McLaurin* stated that: "[t]he removal of the state restrictions will not necessarily abate individual and group predilections, prejudices and choices. But at the very least, the state will not be depriving appellant [McLaurin] of the opportunity to secure acceptance by his fellow students on his own merits."[85] *McLaurin* thus recognized that constitutional doctrine might alter societal values unlike the *Plessy* decision which maintained them. In effect, *Plessy* was dead. The Court in *Brown* was now free to etch a tombstone for the grave of separate but equal dug by *Gaines*, *Sweatt*, and *McLaurin*.

Brown transformed the *McLaurin* Court's suggestion, that equal protection doctrine might alter the perceptions of the white majority, into a constitutional mandate. In contrast to the Court in *McLaurin*, the *Brown* Court explicitly recognized that legal segregation caused black students to perceive themselves as inferior: "to separate them [the students] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely to ever be un-

[85] *Id.* at 641-42, 70 S.Ct. at 853-54.

done."[86] The message was that constitutional doctrine must commandeer a social mission to eradicate the stigma conveyed through racial separation by law. The stigma could be eradicated if the decisions of courts removed the legal barriers supporting racial subjugation thereby serving as moral messages to a white majority permeated with discriminatory values. The separate is inherently unequal rule announced by the Court thus reflects disdain towards the source of the perceptions of black inferiority.

The discussion of remedies in *Brown II*[87] illuminates the scope of the rights created in *Brown I*. The Court in *Brown II* stated that:

> In fashioning and effectuating the decrees, the courts will be guided by equitable principles. Historically, equity has been characterized by practical flexibility in shaping its remedies and by a facility for adjusting and reconciling public

[86] Charles Sumner made a similar argument in 1850 that failed to carry the day. In *Brown*, Chief Justice Warren attributed the phrase "separate but equal" in *Plessy* to a Massachusetts case that involved segregated schools in Boston, Massachusetts. *Roberts v. City of Boston*, 59 Mass. 198, 5 Cush. 198 (1850). In *Roberts*, Charles Sumner advocated the cause of five year old Sara Roberts before the Massachusetts Supreme Court, over ten years before the Civil War, arguing that Boston's segregation of black children branded them with a stigma of inferiority. *Roberts*, 59 Mass. at 203-04. In addition, Sumner argued that segregation injured white school children because their "hearts, while yet tender with childhood, are necessarily hardened by this conduct, and their subsequent lives, perhaps, bear enduring testimony to this legalized uncharitableness." *See* R. Kluger, *Simple Justice* 75-77 (1977).

[87] *Brown v. Board of Educ.*, 349 U.S. 294, 75 S.Ct. 753, 99 L.Ed. 1083 (1955) (*Brown II*).

> and private needs. These cases call for the exercise of these traditional attributes of equity power. At stake is the personal interest of the plaintiffs in admission to public schools as soon as practicable on a non-discriminatory basis. To effectuate this interest may call for elimination of a variety of obstacles in making the transition to school systems operated in accordance with the constitutional principles set forth . . . . [in *Brown I*]. Courts of equity may properly take into account the public interest in the elimination of such obstacles in a systematic and effective manner. But it should go without saying that the vitality of these constitutional principles cannot be allowed to yield simply because of disagreement with them.[88]

The remedy in *Brown II* was derived from the personal interest of the student. *Brown I* held that the personal interest of the student was based on perceptions of racial inferiority conveyed through the effects of racial separation by law. The remedy, the Court in *Brown II* held, must therefore remove all the effects of de jure segregation. Otherwise, the perceptions of black students would remain distorted and the moral aspirations of "separate is inherently unequal"—the attainment of human dignity for all—

[88] *Id.* at 300, 75 S.Ct. at 756. "To that end, the courts may consider problems related to administration, arising from the physical condition of the school plant, the school transportation system, personnel, revision of school districts and attendance areas into compact units to achieve a system of determining admission to the public schools on a non-racial basis, and revision of local laws and regulations which may be necessary in solving the foregoing problems." *Id.* at 300-01, 75 S.Ct. at 756-57.

would be impugned. This aspiration is why public disagreement, the disagreement of those pleased by the status quo, was not an obstacle to the *Brown II* Court.

C. *Green*

The holding in *Green* [89] cannot be understood without considering *Brown I* and *Brown II*. The *Green* Court held that a state has an affirmative duty to create a unitary school system by eliminating, root and branch, the effects of de jure discrimination.[90] The Court stated that:

> The pattern of separate "white and Negro" schools . . . established under compulsion of state laws is precisely the pattern of segregation to which *Brown I* and *Brown II* were particularly addressed. . . . It is of course true that for the time immediately after *Brown II* the concern was with making an initial break in a long-established pattern excluding Negro children from schools attended by white children. The principle focus was on obtaining for those Negro children courageous enough to break with tradition a place in the "white" schools. . . . Under *Brown II* that immediate goal was only the first step, however. *The transition to a unitary, nonracial system of public education was and is the ultimate end to be brought about. . . .*[91]

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[89] *Green*, 391 U.S. at 430, 88 S.Ct. at 1690.

[90] *Id.* at 437-38, 88 S.Ct. at 1693-94.

[91] *Id.* at 435-36, 88 S.Ct. at 1692-93. *See also Dayton Board of Educ. v. Brinkman*, 443 U.S. 526, 537, 99 S.Ct. 2971, 2979, 61 L.Ed.2d 720 (1979) ("Given intentionally segregated schools in 1954, however, the Court of Appeals was quite right in holding that the Board was thereafter under a continuing duty to eradicate the effects of that system. . . ."); *Columbus Board of Educ. v. Penick*, 443 U.S. 449, 460, 99 S.Ct. 2941, 2948, 61 L.Ed.2d 666 (1979) ("The Board's continuing affirmative duty to disestablish the dual system is therefore beyond question."); *Milliken v. Bradley*, 433 U.S. 267, 289-90, 97 S.Ct. 2749, 2761-62, 53 L.Ed.2d 745 (1977) ("More precisely, the burden of state officials is that set forth in *Swann* [*v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 91 S.Ct. 1267, 28 L.Ed.2d 554 (1971)]—to take the necessary steps to 'eliminate from the public schools all vestiges of state-imposed segregation.'"); *Keyes v. School Dist. No. I, Denver, Colo.*, 413 U.S. 189, 200, 93 S.Ct. 2686, 2693, 37 L.Ed.2d 548 (1973) ("Rather, we have held that where plaintiffs prove that a current condition of segregated schools exists within a school district where a dual system was compelled or authorized by statute at the time of our decision in *Brown* . . . the State automatically assumes an affirmative duty to 'effectuate a transition to a racially nondiscriminatory school system. . . .'") (citing *Brown I*, 347 U.S. at 483, 74 S.Ct. at 686); *Alexander v. Holmes County Board of Educ.*, 396 U.S. 19, 20, 90 S.Ct. 29, 29, 24 L.Ed.2d 19 (1969) (*per curiam*) ("Under explicit holdings of this Court the obligation of every school district is to terminate dual school systems at once and to operate now and hereafter only unitary schools.").

Under *Green* the creation of a unitary school system is the goal, a goal tantamount to the elimination of the effects of de jure discrimination, root and branch. If a less demanding standard was adopted, images of inferiority would be memorialized with the force of law, contrary to the vision of *Brown*, because vestiges of discrimination would remain unaddressed. *Brown* commands the application of *Green* in all of its fertility to the public university forum.

By comparison, the district court's application of *Green* was circumscribed. According to the district court, a state discharges its constitutional responsibility by implementing in good faith, race-neutral poli-

cies and procedures.[92] The district court held that the open admissions policy of Mississippi's public universities satisfied this standard.[93]

The district court reasoned that students themselves choose what college to attend under an open admission policy in contrast to elementary and secondary schools where attendance is compulsory.[94] This distinction, sustained by *Bazemore*, is based on student choice, or conversely, that students are not compelled to attend college. It assumes that black students possess the same freedom to choose as do white students. Contrary to *Brown*, however, this assumption ignores the effects of past de jure segregation.

The remedial power granted to district courts by *Green* flows from the concept of stigmatization explicated in *Brown*. *Brown* explicitly recognized that vestiges of de jure segregation distort the perceptions of blacks. Blacks do not, therefore, make choices from a tabula rasa. Instead, they choose against a history of racial subjugation with its attendant messages of inferiority. Freedom of choice is not a panacea:

> [t]here is no universal answer to complex problems of desegregation; there is obviously no one plan that will do the job in every case. The matter must be assessed in light of the circumstances present and the options available in each instance. . . . We do not hold that "freedom of choice" can have no place in such a plan. We do not hold that a "freedom of choice" plan might of itself be unconstitutional, although that argument has been

[92] *Ayers*, 674 F.Supp. at 1551-54.

[93] *Id.*

[94] *Id.* at 1552-53.

> urged upon us. Rather, all we decide today is that in desegregating a dual system a plan utilizing "freedom of choice" is not an end in itself.[95]

The district court in the present case and the five member majority in *Bazemore* may also be understood to mean that the searching inquiry of *Green* applies only if attendance at a particular institution is legally compelled unlike public universities or 4-H and Homemaker clubs. This view of choice, however, is also contrary to *Brown*. *Brown* stated that the stigmatizing effects of segregation are not created by legally compelled attendance but rather from the vestiges of legally compelled separation. Thus the lesson of *Brown* is that the malignancy of apartheid does not vanish in state-sponsored forums simply because attendance is voluntary and admittance race-neutral. Courts must not become anesthetized from gazing too deeply into what some believe is the platonic vision of *Bazemore*. *Bazemore's* vision of a state government is one resurrected from a past marred by racial subjugation without the ashes of its fire-laden history to gray the facade. Unforunately, this vision rests on the blithe assumption that the moral ambition of *Brown* has been conquered; an egalitarian society where the elixir is choice blended into a grog of neutral admissions policies.

The most abhorrent implication of the idea that the effects of segregation may vary with the admissions and attendance policies of an institution, however, is that black citizens are demeaned with the quality of chameleons. The color of their skin is presumed to change with the structure of an institution where they will see the world as do whites. Thus, any stigmatiza-

[95] *Green*, 391 U.S. at 439, 88 S.Ct. at 1694.

tion that flows from the racial identity of the institutions could only come from the thinking of blacks themselves because they are assumed to be able to self-desegregate. To this extent, *Plessy* is resurrected. The *Plessy* Court stated that:

> We consider the underlying fallacy of the plaintiff's argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. *If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it.*[96]

Unfortunately, racial prejudice in our society has not so receded. Even if unintended, it flows from a chronicle of subjugation once encouraged by the rule of our law.

These ruminations, however, should not be troubling. The monocular vision of *Bazemore* does not give cause. For history will not let us arrogate the power to do overtly, what we are confident *Bazemore* did not do covertly, overrule *Brown*, *Green*, and a long line of equal protection cases. If these cases are to die, they at least deserve the dignity of a burial.

IV. DISCUSSION

The defendants have not satisfied their affirmative duty under *Green*. *Green* demands the removal of all vestiges of de jure segregation root and branch. The facts in this case, however, demonstrate that roots are spread all over the terrain and that branches create shadows over areas where *Brown* was supposed to

[96] *Plessy*, 163 U.S. at 551, 16 S.Ct. at 1143 (emphasis added).

usher in rays of sunshine. The badge of inferiority that marks black institutions has not been removed. As such, there remains in Mississippi's higher educational system vestiges of discrimination which distort the perceptions of black students. The racial composition of the student body is not simply the result of student choice.

As the district court stated, the Board adopted the minimum ACT requirement in 1962 precisely because of its adverse effects on blacks.[97] This requirement, presently a 15 for automatic admission to a historically white university, continues to impede most blacks.[98] In 1986, only 3 out of 10 black students scored 15 or higher on the ACT. The district court's rationale, educational reasonableness is not a justification. More accurate, less discriminatory means to predict the college performance of blacks exist. Yet Mississippi does not consider high school grades and other noncognitive data in assessing the applications of minority candidates despite the recommendation of the American College Testing program to the contrary.

The ACT exception for special talents or high risk students, which is more liberal at the historically black institutions, exacerbates the discriminatory effect of the minimum ACT score. The reputation of these institutions as inferior is enhanced because admissions

[97] *Ayers*, 674 F.Supp. at 1555.

[98] Mississippi's ACT policy could discourage potential black students from applying to the historically white universities. *Cf. Dothard v. Rawlinson*, 433 U.S. 321, 330, 97 S.Ct. 2720, 2727, 53 L.Ed.2d 786 (1977) ("The application process might itself not adequately reflect the actual potential applicant pool, since otherwise qualified people might be discouraged from applying because of a self-recognized inability to meet the very standards challenged as being discriminatory.").

qualifications are not as demanding. The exceptions thus perpetuate segregation to the extent that it is easier for blacks to be admitted to a black school. The integration of the historically white universities is not invited. In fact, we question the extent to which the historically white universities publicize the availability of the exceptions.[99]

The racial composition of the faculty and administration of the historically white institutions also has a pernicious effect on the perceptions of blacks. The paucity of blacks on the faculty and administration of the white comprehensive universities allows few black role models at what are considered the superior institutions. Instead, black faculty and administrators are more numerous at the black universities which are perceived as relatively inferior.

The Plan purportedly accounted for the limited supply of black faculty and administrators. By 1986, however, Delta State University, a historically white institution, had the largest percentage of black faculty with five percent. In addition, Alcorn State University and Mississippi Valley State University, historically black institutions, had the smallest percentages of black faculty with doctorates. The Board might have raised the salaries of black faculty and administrators to attract them from the limited pool.

The academic offerings of the various institutions demonstrates that vestiges of de jure discrimination remain entrenched throughout Mississippi's public universities. As of 1986, Alcorn State University and Mississippi Valley State University, historically black, were two of the three institutions ranking lowest in total programs offered and in number of new pro-

[99] *See supra* note 12.

grams approved by the Board. And, Jackson State University, the black institution with the regional designation, continues to offer fewer courses than any of the white comprehensive universities. As offerings diminish, however, universities are less likely to develop diverse student bodies or unique reputations.

The duplication of non-essential courses[100] compounds the problem. The historically white institutions offer a significant number of the undergraduate and masters-level courses offered by the black institutions. This duplication fosters the continued racial identity of the universities to the extent that students may attend either a black or a white institution.

The historically white universities' placement of branch centers near historically black universities also contributed to the racial identity of the institutions. The branches were a part of Mississippi's de jure plan as of 1962.[101] Their impact is apparent at least through 1981 when the Mississippi University Center offered 76% of the bachelors degree programs and 90% of the masters degree programs offered by Jackson State University. The Natchez Center offered 20% of the bachelors degree programs and 66% of the masters degree programs offered by Alcorn State University in the same year. The centers thus reinforced the racial identity of Jackson State University and Alcorn State University over the 1962-1981 period and probably the current composition of their student bodies.

Until 1962, the Board also maintained a racially segregated university system by underfunding the

[100] *See supra* note 25.

[101] *Ayers*, 674 F.Supp. at 1551.

historically black institutions.[102] Over time, funding disparities produced an accumulated deficit to the disadvantage of the historically black institutions. The Board's funding formula does not account for this historical deficit. Similar disparities exist in the funding of the physical plants. The Board implicitly endorsed all of these funding practices by implementing the mission designations in 1981.

The mission designations placed an ostensibly neutral label on each institution. In reality, however, these labels, comprehensive, urban, and regional, served to officially condone the Board's discriminatory funding practices. The white comprehensive universities received the most funding and offered the most courses before the Board implemented the designations in 1981.[103] The designations, based on the resources existing in 1981, were thus objective labels for past discriminatory practices. Perceptions of inferiority were perpetuated under the fiction of educational reasonableness. The heirarchy of the mission designations, with the three historically white institutions labeled comprehensive, reinforced the image of the white schools as the superior institutions of the state.

Vestiges of de jure segregation permeate the public university system of Mississippi. Admissions policies, the racial composition of the faculty and administration, funding practices, academic offerings, and mission designations all perpetuate a stigma of inferiority. Contrary to the mandates of *Brown* and *Green*, a unitary system has not been achieved.

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[102] *Id.*

[103] *Id.*

V. TITLE VI OF THE CICIL RIGHTS ACT

In addition to their equal protection claim the plaintiffs' [104] claim relief under Title VI of the Civil Rights Act of 1964 [105] and its implementing regulations.[106] Section 601 of Title VI states, in pertinent part, that "[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance." [107] In essence, Title VI prohibits discrimination that violates the equal protection clause of the fourteenth amendment.[108] At trial, the plaintiffs did not succeed with their Title VI claim because the district court held that the defendants did not breach their affirmative duty under *Green*.

We disagree. The plaintiffs established an equal protection claim. The remaining question is thus whether there has been any discrimination, in the words of Title VI, "under any program or activity receiving federal financial assistance." [109] The quoted

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[104] The United States intervened under 42 U.S.C. section 2000h-2 (1989) three months after the private plaintiffs filed their complaint against the state of Mississippi. This provision entitles the United States to the relief that it would have obtained if it had initiated the action.

[105] 42 U.S.C. section 2000d et seq. (amended Oct. 21, 1986, Pub.L. 99-506, Title X, section 1003, 100 Stat. 1845; Mar. 22, 1988, Pub.L. 100-259, Title VI, section 606, 102 Stat. 31).

[106] 34 C.F.R. sections 100.1-100.13 (1988).

[107] 42 U.S.C. section 2000d (1981).

[108] *Ayers*, 674 F.Supp. at 1551 n. 7.

[109] 42 U.S.C. section 2000d-4a (1989) (entitled " 'Program or activity' defined"). We do not have to decide whether the

phrase was the subject of the Supreme Court's decision in *Grove City College v. Bell.*[110]

The Court in *Grove City* held that Title VI liability is established only with evidence that discrimination occurred in a program or activity specifically supported by federal funds.[111] If a college received federal money in the area of student loans, for example, Title VI could not be used to prevent discrimination in the area of student admissions. Institution-wide discrimination is thus not actionable under *Grove City* when federal financing is program specific. The result in *Grove City* was based on Congressional intent.[112]

Congressional enactments are often mute regarding important questions of statutory interpretation. When Congress decides to speak clearly, however, we must listen with our ears sharply attuned. On March 22, 1988, Congress overrode the President's veto of

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plaintiff's must prove discriminatory intent instead of discriminatory impact. *Alexander v. Choate,* 469 U.S. 287, 293, 105 S.Ct. 712, 716, 83 L.Ed.2d 661 (1985) (Title VI itself reaches only instances of intentional discrimination although the implementing regulations could allow a disparate impact analysis). *Cf. Guardians Ass'n v. Civil Service Comm'n of the City of N.Y.,* 463 U.S. 582, 607, n. 27, 103 S.Ct. 3221, 3235, n. 27, 77 L.Ed.2d 866 (1983) (Proof of intentional discrimination is necessary for the recovery of compensatory damages although only proof of discriminatory impact is necessary in a suit to enforce the regulations adopted under Title VI.). Our case involves past intentional discrimination continuing to the present through a breach of the affirmative duty placed on the state by *Green.*

[110] 465 U.S. 555, 104 S.Ct. 1211, 79 L.Ed.2d 516 (1984).

[111] *Id.* at 570-76, 104 S.Ct. at 1219-23.

[112] *Id.* at 563-70, 104 S.Ct. at 1216-19.

the Civil Rights Restoration Act of 1987.[113] In effect, Congress shouted across the park to the Supreme Court: "You misunderstood our intention. We want the term 'program or activity' to mean the whole university, not just the student loan program."

Originally, in the 1964 Civil Rights Act, Congress did not define the term "program or activity." The *Grove City* Court's narrow reading of this crucial term, however, moved Congress to reinflate it with the Civil Rights Restoration Act of 1987.[114] The Act states, in pertinent part, that "[f]or purposes of this subchapter, the term 'program or activity' and the term 'program' mean all of the operations of a college, university, or other postsecondary institution, or public system of higher education. . . ." [115]

This section means that it is possible to establish institution-wide discrimination under Title VI when there is federal financing that is program specific. In this sense, the term "program or activity" encompasses the entire college or university. The present case, however, was tried after the 1984 *Grove City* decision but before Congress acted in 1988. It must therefore be determined whether *Grove City* controls the outcome of this case or whether the legislation applies retroactively.

Retroactive application of a statute is appropriate when Congress enacts the statute to clarify the Supreme Court's interpretation of previous legislation thereby returning the law to its previous posture.[116]

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[113] Pub.L. 100-259, 102 Stat. 28, 42 U.S.C. section 2000d-4a (1988).

[114] 42 U.S.C. section 2000d-4a(2)(A) (1988).

[115] *Id.*

[116] *See Bonner v. Arizona Dept. of Corrections,* 714 F.Supp. 420, 422 (D.Ariz.1989) (Civil Rights Restoration Act of 1987

This rule flows from two of the Supreme Court's canons of statutory construction. First, subsequent legislation declaring the intent of an earlier statute is entitled to great weight.[117] The Civil Rights Restoration Act was specifically enacted to clarify the *Grove City* Court's reading of the term "program or activity" in the Civil Rights Act of 1964. The Senate report accompanying the passage of the Act[118] states that the bill was introduced:

> to overturn the Supreme Court's 1984 decision in *Grove City College v. Bell*. . . . The legislative history of the statutes in question shows Con-

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applies retroactively); *United States v. Berg*, 710 F.Supp. 438, 442 (E.D.N.Y.1989) ("[W]here Congress clearly indicates its intention to reject a recent Supreme Court interpretation and restore the law to its former state, retroactive application of a newly enacted statute is appropriate."); *Leake v. Long Island Jewish Medical Center*, 695 F.Supp. 1414, 1417-18 (E.D.N.Y.1988) (Terms "program or activity" in the Civil Rights Restoration Act of 1987 apply retroactively) aff'd, 869 F.2d 130 (2nd Cir.1989); *Mrs. W. v. Tirozzi*, 832 F.2d 748, 755 (2nd Cir.1987) ("The 1986 amendment in the present case [the Handicapped Children's Protection Act of 1986] simply codifies a congressional purpose long in place which Congress believed the Supreme Court had misinterpreted" so the plaintiffs could bring suit under the Act even though the Act was passed one year after the suit was brought).

[117] *Red Lion Broadcasting Co. v. F.C.C.*, 395 U.S. 367, 380-81, n. 6, 89 S.Ct. 1794, 1801-82, n. 6, 23 L.Ed.2d 371, n. 6 (1969); *Glidden v. Zdanok*, 370 U.S. 530, 541, 82 S.Ct. 1459, 1468, 8 L.Ed.2d 671 (1962) (opinion of Mr. Justice Harlan, joined by Mr. Justice Brennan and Mr. Justice Stewart); *Federal Housing Admin. v. Darlington Inc.*, 358 U.S. 84, 90, 79 S.Ct. 141, 145, 3 L.Ed.2d 132 (1958).

[118] There was no house report.

> gress intended institution-wide coverage. . . . In enacting the four civil rights statutes, Congress intended that each be broadly interpreted to provide effective remedies against discrimination. . . . Contrary to the view of the Supreme Court that the language common to these statutes [i.e. 'program or activity'] should be given limited interpretation, Congress intended institution-wide coverage and the executive branch has historically insisted upon this view. It was understood at the outset that the task of eliminating discrimination from institutions which receive federal financial assistance could only be accomplished if the civil rights statutes were given the broadest interpretation.[119]

Second, the construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong.[120] In the Civil Rights Restoration Act of 1987 itself, Congress stated that:

> certain aspects of recent decisions and opinions of the Supreme Court have unduly narrowed or cast doubt upon the broad application of . . .

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[119] S.Rep. No. 100-64, 100th Cong., 2d Sess. 2-5, reprinted in 1988 U.S. Code Cong. & Admin.News 3-7 (bill introduced "to overturn the Supreme Court's 1984 decision in *Grove City College v. Bell* . . . and to restore the effectiveness and vitality of the four major civil rights statutes that prohibit discrimination in federally assisted programs.").

[120] *N.L.R.B. Hendricks County*, 454 U.S. 170, 177, 102 S.Ct. 216, 222, 70 L.Ed.2d 323 (1981); *N.L.R.B. v. Bell Aerospace*, 416 U.S. 267, 274-75, 94 S.Ct. 1757, 1761-62, 40 L.Ed.2d 134 (1974); *Red Lion Broadcasting Co. v. F.C.C.*, 395 U.S. 367, 381, S.Ct. 1794, 1801, 23 L.Ed.2d 371 (1969); *Udall v. Tallman*, 380 U.S. 1, 16, 85 S.Ct. 792, 801, 13 L.Ed.2d 616 (1965).

> Title VI of the Civil Rights Act of 1964 and legislative action is necessary to restore the prior consistent and longstanding *executive branch interpretation* and broad, institution-wide application of those law as previously administered.

The Senate Report and the statements surrounding the passage of the Act thus indicate that Congress intended to clarify the effect of the *Grove City* decision and restore the previous understanding of the words "program or activity" crucial to the efficacy of the civil rights statutes.[121] The Civil Rights Restoration Act of 1987 operates retroactively.

The district court found that Mississippi's public universities receive federal financial assistance. In addition, we stated that Mississippi violated the equal protection clause by breaching its affirmative duty under *Brown* and *Green*. The plaintiffs have therefore established a claim under Title VI.

VI. A GUIDEPOST ON REMAND

The Chinese have said that a thousand mile journey starts with one step. During the twelve year history of this case, there were many steps, but no discernable degrees of progress on the road towards unitary status. Unfortunately, this case lingered, loitered, and lulled for more than a decade.

The fourteenth amendment does not purport to address all areas of life and living. It does, however, set a goal fundamental to the maintenance of a truly democratic society—the removal of racial stigma. Thus even if the roots of prejudice and the effects of segregation run deep, progress is crucial to assure equality for all.

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[121] In addition, Public Law 100-259 does not have an effective date, this is unusual.

Freedom of choice is a step, and only that, on the road to this goal. And in Mississippi, although choice is neither spurious nor specious, desegregation is not being achieved. In this regard, the prophecy of *Brown*, the pragmatism of *Meredith*, the fertility of *Green*, and the hesitation of *Bazemore* are instructive. These cases affirm that true freedom of choice remains real and corporeal. One is reminded of the remark attributed to President Truman, "If it works, don't fix it." The converse, however, is axiomatic, if it does not work, fix it or abandon it.

But before a unitary status award is made, or even a medal for that honor cast, the court should have the assistance of other disciplines. Psychologists, sociologists, economists, engineers, doctors, and professionals from all relevant areas of learning play a role. Windows must open to ventilate the court room with ideas from the winds of truth. To this end, testimony, depositions, cross examinations and opinions can assist. Only then should the parties come forth with a definite plan for the achievement of unitary status.

The road to unitary status will not be impassable, but it cannot be negotiated without sacrifice and expenditure of treasure. In this case, however, remember that we have not even seen the road signs for the exit to impossibility. We do not ask that justice be done even though the heavens may fall. But if the stigmatizing effects of desegregation are to be vanquished, even if only in increments, the improvement must be continual. No cessation is permissible until the mandate of *Brown* is satisfied. *Brown* prescribed some hesitation as to time, but no hesitation as to result.

Thus if a diminution of what some might label meritocracy occurs, it cannot excuse loyalty to the

nineteenth century ideal signified by the abolition of slavery. We do not want to make a mockery of the rally cry of the 1960's "we shall overcome" as the twenty first century approaches. For only when this hope is realized may the jurisdiction of the federal courts truly be relinquished.

These words should serve to illuminate the road map that the district court must create to remedy the violation of the equal protection clause in this case. They give hope that any sortie on remand will not be long or bitterly fought. We have held that *Brown* and *Green* place an affirmative duty on the state to eliminate all of the vestiges of segregation, root and branch, in the public university forum. Neither this duty nor the command of Title VI has been met. We thus reverse and remand for proceedings not inconsistent with this opinion.

REVERSED AND REMANDED

DUHÉ, Circuit Judge, Dissenting:

Despite the well-crafted reasoning and artful prose employed by the majority, I find myself in basic disagreement.

In my view, our decision is controlled by the clear teaching of the Supreme Court in *Bazemore v. Friday*, 478 U.S. 385, 106 S.Ct. 3000, 92 L.Ed.2d 315 (1986), and *Alabama State Teachers' Association v. Alabama Public School and College Authority*, 289 F.Supp. 784 (M.D.Ala.1968), *aff'd per curiam*, 393 U.S. 400, 89 S.Ct. 681, 21 L.Ed.2d 631 (1969). These cases teach that, where attendance choices are voluntarily made, our Constitution requires that a state discontinue prior discriminatory practices and adopt wholly race-neutral criteria for making the decisions necessary to administer and operate the system. The

majority, relying on district and other circuit court decisions, has categorically rejected that teaching and imposed upon the state the same constitutional duty required for primary and secondary education where freedom of choice is unavailable and services are free of charge. In so doing it takes a liberty that is simply not available to courts of appeals.

The majority has ably distilled the essence of *Brown I* and *II*, concluding that "[C]onstitutional doctrine must commandeer a social mission to eradicate the stigma conveyed through racial separation by law." At 749. Yet if the social mission itself is not at issue in this case, the reach of that mission most certainly is. Under current law the mission to eliminate all vestiges of de jure discrimination "root and branch" does not reach the university. If it is contrary to *Brown* to assume that black students possess the same freedom to choose as white students, as the majority states, a court of appeals is not thereby entitled to circumvent a contrary decision of the Supreme Court which flatly and squarely relies on a student's freedom to choose. Moreover, the majority seeks to extend *Green* on the very basis—freedom to choose—that the *Bazemore* Court declined to extend it. *Bazemore* simply cannot be distinguished on the basis that the record in this case is "replete with the disease [of discrimination];" such analysis merely puts the evidence ahead of the standard.

Until the Supreme Court teaches otherwise we are bound by its existing pronouncements. The reasons why the rule of *Bazemore* and *Alabama* is appropriate in the higher education setting where one has freedom of choice and must bear the cost of that choice are fully explored in those opinions so are not repeated here. I fully subscribe to those reasons. I respectfully dissent.

APPENDIX C

UNITED STATES DISTRICT COURT
N.D. MISSISSIPPI
GREENVILLE DIVISION

No. GC75-9-NR

JAKE AYERS, SR., ET AL., PLAINTIFFS,

UNITED STATES OF AMERICA,
PLAINTIFF-INTERVENOR,

v.

WILLIAM ALLAIN, GOVERNOR, STATE OF MISSISSIPPI; W. RAY CLEERE, COMMISSIONER OF HIGHER EDUCATION; BOARD OF TRUSTEES OF STATE INSTITUTIONS OF HIGHER LEARNING, BETTY A. WILLIAMS, PRESIDENT, THOMAS D. BOURDEAUX, VICE PRESIDENT, WILLIAM H. AUSTIN, JR., FRANK O. CROSTHWAIT, JR., BRYCE GRIFFIS, WILL A. HICKMAN, CHARLES C. JACOBS, JR., WILLIAM M. JONES, JOHN R. LOVELACE, M.D., DIANE MILLER, DENTON ROGERS, JR., SIDNEY L. RUSHING, GEORGE T. WATSON, MEMBERS; DELTA STATE UNIVERSITY, KENT WYATT, PRESIDENT; MISSISSIPPI STATE UNIVERSITY, DONALD W. ZACHARIAS, PRESIDENT; MISSISSIPPI UNIVERSITY FOR WOMEN, JAMES W. STROBEL, PRESIDENT; UNIVERSITY OF MISSISSIPPI, R. GERALD TURNER, CHANCELLOR; UNIVERSITY OF SOUTHERN MISSISSIPPI, AUBREY K. LUCAS, PRESIDENT; ET AL., DEFENDANTS.

Dec. 10, 1987

MEMORANDUM OPINION

BIGGERS, District Judge.

This class action was commenced on January 28, 1975. The plaintiffs alleged that the defendants were maintaining a racially dual system of public higher education in violation of the Fifth, Ninth, Thirteenth, and Fourteenth Amendments to the United States Constitution, 42 U.S.C. §§ 1981 and 1983, and Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, *et seq.* On April 21, 1975, the United States, by its Attorney General, filed its complaint-in-intervention pursuant to the Fourteenth Amendment, §§ 601 and 602 of Title VI and § 902 of Title IX of the Civil Rights Act of 1964, 42 U.S.C. § 2000h-2. The United States alleged, *inter alia*, that actions of the defendants maintained and perpetuated an unlawful dual system of higher education based on race in violation of the Fourteenth Amendment and Title VI. The plaintiffs essentially seek injunctive relief directing the defendants to bring the various components of Mississippi's public system of higher education into conformity with the requirements of the aforementioned statutes and constitutional provisions.

I. Introduction

The plaintiffs are black citizens of the State of Mississippi, including black students attending or desirous of attending public institutions of higher learning in the State of Mississippi, black taxpayers residing in the State of Mississippi, and parents of black students attending public institutions of higher learning in the State of Mississippi. The chief defendants are the Governor of the State of Mississippi, the Board of Trustees of State Institutions of Higher

Learning, and the individual members sued in their personal and official capacities, each of the institutions identified as the historically white institutions and their chief administrative officers, the State Department of Education, and the State Superintendent of Education.

All public institutions of higher learning in the state are under the management and control of the Board of Trustees of State Institutions of Higher Learning (Mississippi Constitution of 1892, § 213-A), whose authority is plenary. The defendant State Department of Education is charged with the execution of laws relating to the administrative, supervisory, and consultive services to the public schools, agricultural high schools, and junior colleges of the State of Mississippi. The defendant State Superintendent of Education is responsible for the administration, management, and control of the Department of Education, subject to the direction of the State Board of Education. Miss.Code Ann. § 37-3-5 (1972).

The private plaintiffs and the United States assert that at the time of the Supreme Court's decision in *Brown v. Board of Education*, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed 873 (1954), the defendants had established racially separate systems of public higher education for black and white citizens of Mississippi; that the institutions designated to serve blacks were markedly inferior to the institutions established by defendants to serve whites; that from 1954 until the present defendants have maintained and perpetuated the racially dual system of public higher education through, *inter alia*, policies and practices governing student admissions, employment of faculty and administrative staff, and through the operation of historically white institutions or branches thereof in

close proximity to historically black institutions; that the defendants have denied equal educational opportunity to black students and faculty by discriminating against historically black institutions with respect to, *inter alia*, institutional missions, number and level of academic programs, quality of instructional staff, allocation of land grant functions, the level and quality of physical plant, and the distribution of financial resources; and that defendants have failed to effectively dismantle the racially dual system of public higher education in Mississippi and remain today under legal obligation to eliminate the vestiges of racial dualism "root and branch."

The defendants answered the allegations of the plaintiffs and the plaintiff-intervenor by contending that a good faith nondiscriminatory and nonracial admissions and operational policy with respect to students, faculty, and staff has been implemented and maintained in the state-wide system of public higher education; and that with such a policy designed to insure equality of opportunity, the mere continued existence of institutions of higher learning with predominantly black and predominantly white student bodies and faculty does not represent a denial of equal protection, considering individual freedom of choice of all qualified students, black and white, to enroll in the colleges of their choice, and the varying educational objectives and advantages of such institutions. The defendants contend further that throughout the state-wide system there have been affirmative-action programs designed to attract qualified black students and personnel to historically white institutions and to attract qualified white students and personnel to historically black institutions; that equal protection has been and is achieved by the operation of a state-wide system dedicated to the enhancement of integrated

university opportunities coupled with the goal of quality education; that a fully integrated unitary statewide system of higher education exists in Mississippi today wholly untainted by discriminatory actions or purposes; and that within such a system the achievement of particular proportions or percentages of desegregation must be judicially evaluated with other legitimate educational and societal interests.

Pursuant to 28 U.S.C. § 2281, a three-judge court was convened to preside over this cause. On September 17, 1975, by order issued by Judge William C. Keady (then Chief Judge of the United States District Court for the Northern District of Mississippi and acting in his capacity as managing judge of the three-judge court), a plaintiff class was certified and defined as:

> All black citizens residing in Mississippi, whether students, former students, parents, employees, or taxpayers, who have been, are, or will be discriminated against on account of race in receiving equal educational opportunity and/or equal employment opportunity in the universities operated by said Board of Trustees.

On the same day, this court ordered the separation for trial purposes of the claims against the senior colleges and universities, that is, the Institutions of Higher Learning and the Board of Trustees of State Institutions of Higher Learning, from the claims against the sixteen public junior colleges, the Junior College Commission, and the Department of Education.

During the approximately twelve years since this case was filed until the present, considerable time and effort have been devoted by the parties, under the court's auspices, toward the consensual resolution of the many issues raised herein. After repeated good

faith attempts failed to achieve a mutually satisfactory comprehensive agreement, this court [1] ordered the completion of discovery and set this cause for trial to commence on April 27, 1987. Having heard the evidence presented during a five-week bench trial, during which the court heard testimony from 71 witnesses and received 56,700 pages of exhibits, and now having maturely considered the testimony, exhibits and post-trial memoranda submitted by the parties, the court is in a position to enter its findings of fact and conclusions of law pursuant to Fed.R.Civ.P. 52.

II. Findings of Fact

A. History and Overview of the System of Higher Education

The Board of Trustees of State Institutions of Higher Learning (hereinafter referred to as "the Board of Trustees") was created by statute in 1932. In 1944 it became a constitutional board with plenary power over all Mississippi public senior colleges and universities. The Mississippi state-wide system of higher education consists of eight institutions and several entities under the jurisdiction of the Board of Trustees. The eight institutions of higher learning under the Board of Trustees' control are described as follows:

University of Mississippi

Chartered on February 24, 1844, the University of Mississippi, at Oxford, commenced its first session on November 6, 1848, with a faculty of four members. The trustees and the faculty sought to broaden the

[1] In May, 1985, the three-judge court was dissolved and this cause was transferred to the present judge for further proceedings.

work of the institution by the creation of professional and specialized schools so as to build it into a university in fact as well as in name. In accordance with that purpose, the School of Law was opened in 1854.

Coeducation came with the admission of women students in 1882, and the first woman was added to the faculty in 1885. The first summer session was held in 1893, the School of Engineering was established in 1900, and the Schools of Education and Medicine were opened in 1903. Subsequently, the School of Pharmacy was created in 1908, the School of Commerce and Business Administration in 1917, the graduate school in 1927, and the School of Nursing in 1958.

The legislature mandated that the University of Mississippi serve white persons only.

Alcorn State University

Alcorn State University, initially designated as Alcorn Agricultural and Mechanical College, the oldest land grant college for blacks in the United States, had its beginning in 1830 when the Presbyterian Church established Oakland College for the education of white male students in the southwestern region of the state. The Presbyterian school closed its doors at the beginning of the civil war and upon failing to reopen after the war the college was purchased by the state and renamed Alcorn University in 1871, in honor of the late James L. Alcorn who was then Governor of the State of Mississippi.

In accordance with the Morrill Land Grant Act, the Mississippi State Legislature renamed Alcorn University as Alcorn Agricultural and Mechanical College of the State of Mississippi and designated it to

serve as an agricultural college for the education of Mississippi's black youth.

Mississippi State University

In 1878, the legislature established the Mississippi Agricultural and Mechanical College and located it at Starkville, Mississippi. It was opened to students in 1880 and, in 1930, the institution was made coeducational. In 1932, its name was changed by act of the legislature to Mississippi State University of Agriculture and Applied Science. The University is organized for resident teaching, agricultural research, and agricultural extension. The School of Engineering was organized in 1902, the School of Agriculture in 1903, the School of Education in 1935, the School of Business in 1915, and the School of Arts and Science in 1956. The graduate school, organized in 1936, offers courses leading to the Master of Science degree and Doctor of Philosophy degree in the fields of study and investigation which are distinctly in the land grant program of higher education. Additional divisions and activities are: the Business Research Station, Department of Adult Education and General Extension, Department of Military Science and Tactics, State Plant Board, State Chemical Laboratory, State Seed Testing Laboratory, the Engineering and Industrial Research Stations, Agriculture Extension Service, and Agriculture Experiment Station.

Student enrollment at Mississippi State University was restricted to white persons only by act of the legislature.

Mississippi University for Women

The Industrial Institute and College was established by the legislature in 1884 as the first state-supported college established exclusively for the higher

education of women in the United States. The college was located at Columbus, Mississippi and opened its first session in 1885 with Professor R.W. Jones as president. The industrial feature made it possible for women, who otherwise would not have attended college, to work their way through college. The growth of the institution was rapid and steady, almost every year seeing new buildings and new features added. In 1922, its name was changed from Industrial Institute and College to Mississippi State College for Women. Departments are maintained in liberal arts, home economics, music, art, secretarial science, teacher education, and library science. Mississippi University for Women was established by an act of the legislature approved on March 12, 1884 for the education of white women in the arts and sciences.

University of Southern Mississippi

The University of Southern Mississippi is located in Hattiesburg, Mississippi, and was established by an act of the legislature in 1910 under the name of Mississippi Normal College. Its purpose, primarily, was the training of teachers for the public schools of the state. Its first session was opened in 1912. In 1924 the name of the institution was changed to State Teachers College, and changed again by the legislature in 1940 to Mississippi Southern College, and changed again in 1962 to its present name. With the changes in name, there have been changes in function and curricular of the institution. In 1947, graduate work in the fields of education and music were authorized and the Institute of Latin American Studies was organized. In 1957, the Board of Trustees reorganized the college, establishing schools of arts and sciences,

education and psychology, commerce and business administration, and graduate studies.

Student enrollment at the University of Southern Mississippi was restricted to white persons only by act of legislature.

Delta State University

Delta State College was established in 1924 by an act of the legislature and its doors were opened for students the following year. It is located at Cleveland, Mississippi in the Delta region. It is among the youngest of the state's institutions of higher learning. Delta State University confers bachelor of science degrees in education and gives courses in music and art. It also provides a standard liberal arts program leading to the Bachelor of Arts degree.

Jackson State University

Jackson State College, a predominantly black institution located on approximately 50 acres of land in the City of Jackson, Mississippi, was transferred to the State of Mississippi in 1940 to become a training school for black teachers. The instructional program includes liberal arts and teacher education, with nursing and graduate education also offered.

Jackson State University was established by an act of legislature on May 6, 1940, for the purpose of training black teachers for the black public schools of this state.

Mississippi Valley State University

Mississippi Valley State College was established in 1946 by the legislature for the purpose of educating teachers primarily for rural and elementary black schools and to provide vocational training for black students. The college is located at Itta Bena, Mis-

sissippi. It opened its doors to students, in 1950 and has grown into an institution primarily geared toward community service and adult education.

The Board of Trustees is charged with the duty to manage and control the eight public universities. The powers and duties of the Board of Trustees include, *inter alia*, control over all funds appropriated and taxes allocated by the legislature for support and maintenance of the institutions; approval of new academic programs and departments; approval of individual institutional and state-wide capital and operational budgets; approval of admission standards and procedures for each institution (U.S. Exhibit 636).

At the time the United States Supreme Court issued the decision in *Brown v. Board of Education*, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954), declaring that the "separate but equal" principle set forth in *Plessy v. Ferguson*, 163 U.S. 537, 16 S.Ct. 1138, 41 L.Ed. 256 (1896) was no longer the law and that racially segregated public education was inherently unequal, Mississippi's higher education system was both separate and unequal. In 1954, the Board of Trustees issued a report entitled the "Brewton Report" which attempted to describe the relative disparities existing in the system of higher education in terms of the comparative opportunities available to white and black citizens. The report stated that, as of 1954, the educational opportunities available to black citizens at the university level were limited to teacher education, agriculture and mechanical arts, and the practical arts and trades, whereas white citizens enjoyed a full range of program offerings. The report goes on to note the efforts undertaken by the state and the Board of Trustees to improve the number and level of program offer-

ings available to black citizens in an effort to equalize opportunities.[2]

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[2] In 1954, H.M. Ivy, President of the Board of Trustees, submitted to the full board and its executive secretary, on behalf of the seven board members served as a study committee, a 369-page report entitled "Higher Education in Mississippi". A section of the report entitled "Basic Inequalities in Higher Education in the State" referred specifically to higher education as follows:

> Even greater inequalities exist in the area of higher education. It has been reported earlier that opportunities in this field are limited in the three colleges to undergraduate training in teacher education, in agriculture and the mechanical arts, and in the practical arts and trades; whereas the needs of the white population are served by five colleges, with offerings extending from a variety of undergraduate programs through extensive offerings on the graduate and professional levels. In 1952-53, there were 3,432 students enrolled in all the colleges for Negroes in the state, or 0.3% of the total Negro population; whereas in the colleges and universities for white students, including graduate students, there were enrolled 18,277 students, or 0.9% of the total white population.
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> . . . .
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> Of the total of $10,031,539.40 allocated to the institutions for higher education for the period 1952-54, $1,577,175.46 or 15.7% went toward the development of higher education for Negroes. . . . These data have been utilized to establish the point that, in the past, opportunities for the higher education of Negroes in the state have been far less than those provided for other citizens. It should be recognized, however, that there has been awareness of these inequalities on the part of the Board of Trustees of the state institutions of higher learning and the legislature of the state; and steps have been taken to lessen the gaps. Prior to the recent Supreme Court decisions, the legislature adopted a public school equalization program designed to provide the same quality and quantity of education for Negroes as for whites.

At the time of the U.S. Fifth Circuit Court of Appeals decision in *Meredith v. Fair*, 298 F.2d 696 (5th Cir.1962), the Board of Trustees, contrary to the mandate of *Brown v. Board of Education*, *supra*, continued to operate a racially dual system of higher education. At least until October, 1962, enrollment at each of the eight public institutions was limited in accordance with the respective historic racial designation, that is, there were no black students attending any of the historically white universities and no white students enrolled at the historically black colleges. (U.S. Exhibit 636, pages 13-14.) The efforts of the members of the Board of Trustees and the officials of the University of Mississippi together with various state officials, including the Governor and Lieutenant Governor of the State of Mississippi, and the Mississippi Legislature to impede and deter efforts to integrate the student body at the University of Mississippi during the 1961-62 school year are well documented. *See, e.g., Meredith v. Fair*, 305 F.2d 341 (5th Cir.1962), *cert. denied*, 371 U.S. 828, 83 S.Ct. 49, 9 L.Ed.2d 66 (1962); *Meredith v. Fair*, 313 F.2d 534 (5th Cir.1962). Black students were not allowed to enroll at a historically white university under the management and control of the Board of Trustees until after the University of Mississippi was required by order of this court in *Meredith v. Fair* to admit and enroll James H. Meredith. The years in which each of the historically white universities first enrolled a black student are as follows:

University of Mississippi	1962
Mississippi State University	1965
Mississippi University for Women	1966
University of Southern Mississippi	1967
Delta State University	1966

The historically black universities first enrolled a white student in the years indicated below:

Alcorn State University	1966
Jackson State University	1969
Mississippi Valley State University	1970

(U.S. Exhibit 635).

The Board of Trustees' discriminatory policy also encompassed the hiring of faculty and staff at the eight universities. Employment practices followed the historical racial designations at each of the universities. The years in which the eight institutions first employed opposite race, full-time faculty members are as follows:

Historically White Universities

Mississippi University for Women (U.S. Exhibit 232)	1970-71
University of Mississippi (U.S. Exhibit 234)	1970-71
University of Southern Mississippi (U.S. Exhibit 236)	1970-71
Delta State University (U.S. Exhibit 229)	1973-74
Mississippi State University (U.S. Exhibit 231)	1974-75

Historically Black Universities

Alcorn State University (U.S. Exhibit 228)	1966-67
Jackson State University (U.S. Exhibit 230)	1967-68
Mississippi Valley State University (U.S. Exhibit 233)	1968-69

Several years after the efforts to integrate the student bodies at each of the eight public universities reached their focal point, the United States Department of Health, Education and Welfare (hereinafter referred to as "HEW") attempted to extract from the State of Mississippi and the Board of Trustees a cohesive plan designed to disestablish the former *de jure* racially segregated system. In response to a March, 1969 HEW letter sent to the state requesting the submission of a desegregation plan to HEW within 120 days, the Board of Trustees submitted a "Plan of Compliance" in 1974 (U.S. Exhibit 1). On September 19, 1974, the Board of Trustees officially instructed the presidents of each university to implement the Plan of Compliance to the best of their abilities within the resources available. (U.S. Exhibit 913.) The Plan of Compliance expressed a basic objective of improving educational opportunities for all citizens emphasizing equal access and the retention of members of minority races to be enrolled and/or employed at all public colleges and universities in Mississippi. The Plan of Compliance made specific projections for opposite race student enrollment at each of the institutions of higher learning from 1973 through 1981 and promised assessment of enrollees and necessary remedial and developmental programs, in order to promote opposite race student retention. Specific projections were made also with respect to faculty and staff hiring for the eight institutions for the years 1974 through 1981. The Plan noted that special efforts would be necessary to comply with the projections for faculty and staff hiring, which contemplated recruiting qualified undergraduate students, and further noted that additional monies would be sought from the legislature to support this program. As to academic programs, the Plan stresesed the importance

of desirable programs in attracting students to universities, placed a high priority on strengthening existing programs at the three historically black institutions, and promised priority for such institutions for new programs.

The Plan of Compliance also set forth mechanisms for eliminating the competition experienced by Jackson State University and Alcorn State University posed by the operation of the University Center in Jackson and the University of Southern Mississippi Center at Natchez. The Plan stated that the physical appearance of schools would be closely scrutinized and improvements would be made as funds were made available by the legislature, and further observed that funding had been distributed among the institutions in an equitable manner in the preceding four years, and special legislative appropriations would be sought in order to assist in the implementation of the projections and goals set forth in the Plan of Compliance.

Although HEW's Office of Civil Rights rejected the Board of Trustees' proposed Plan of Compliance for failure to address the separate public junior college system over which the Board possessed no authority, the Board of Trustees adopted the Plan of Compliance and required that each of the institutions under its control adopt policies and procedures designed to implement the goals and projections set forth in the Plan of Compliance. HEW's rejection of the Plan of Compliance precipitated this lawsuit.

B. Student Admission, Recruitment and Retention

1. Admission Requirements and Student Enrollment

The plaintiffs allege that black students are denied equal access to the institutions of higher learning because of the entrance requirements set up by the Board of Trustees.

On February 1, 1961, the Registrar of the University of Mississippi received an application from James H. Meredith, a black male, who sought admission to the 1961 mid-year or spring session, which commenced on February 6, 1961. (U.S. Exhibit 913.) On February 4, 1961, the Registrar informed Meredith that consideration of all pending applications had been discontinued due to alleged "overcrowded conditions." Several days later, on February 7, 1961, the Board of Trustees adopted a policy governing admission to the eight institutions of higher learning. The new policy required that all students applying for admission to the freshman class of any of the state institutions of higher learning as of September 1, 1961, must take a test or tests prepared by the American College Testing Program (ACT). This policy also addressed acceptance of transfer students, transfers at mid-term, applications containing "false, contradictory, questionable, or uncertain data," and receipt of a "letter of admission" before presenting oneself for registration. (U.S. Exhibit 913.)

On April 20, 1961, the Board of Trustees reaffirmed the alumni voucher requirement adopted in 1954 which required the submission of at least five letters of recommendation as to good moral character from alumni of the institution(s) to which application is made. (U.S. Exhibit 912; U.S. Exhibit 64.) On August 24, 1961, the Board of Trustees adopted a more detailed admission policy. In addition to reiterating the admission requirements promulgated on February 7, this policy: (a) "authorized [each institution] to set a minimum score which applicants to such institution must each make on the American College Test [hereinafter referred to as "ACT"] in order to be eligible for consideration for admission," (b) provided

that applications could not be considered "continuing," and (c) stated that applications must include "substantially complete responses made in good faith."

A short time after Meredith was denied admission to the University of Mississippi the Fifth Circuit Court of Appeals in *Meredith v. Fair*, 298 F.2d 696 (5th Cir.), *cert. denied*, 371 U.S. 828, 83 S.Ct. 49, 9 L.Ed.2d 66 (1962), required his immediate admission and struck down the alumni voucher requirement as "a denial of equal protection of the laws, in its application to Negro candidates." *Meredith*, 298 F.2d at 701-02.

In 1963, Mississippi State University, the University of Mississippi, and the University of Southern Mississippi enacted policies requiring all freshman applicants to achieve a minimum composite ACT score of 15. (U.S. Exhibit 913.) Mississippi State University and the University of Southern Mississippi did not admit their first black pupils until 1965 and 1967, respectively.

As of the mid-1970's, the Board of Trustees had not established comprehensive admission standards on a system-wide basis that incorporated either high school achievement or specific ACT requirements. While the Board of Trustees continued to follow its policy of requiring all applicants to take the ACT, each institution was afforded wide latitude in the utilization of the test. Mississippi State University, the University of Mississippi, and the University of Southern Mississippi continued to follow a policy which contemplated achievement of a minimal score of 15 with qualified admission of students failing to achieve this score; Delta State University similarly required a 15 with probationary admission being afforded to students achieving ACT scores of 12, 13, and 14. Mis-

sissippi University for Women utilized a regression equation which included the ACT composite score as a component; and Alcorn State University, Jackson State University, and Mississippi Valley State University, while requiring all students to take the ACT, did not require a minimum score for admission. (U.S. Exhibit 039.)

Concerns arose during the 1975-76 academic year with respect to the continued appropriateness of the admission policies and procedures in place at each of Mississippi's public universities. Prompted by complaints voiced by university faculty and staff regarding the low quality and level of preparation of incoming freshmen, the Board of Trustees and its professional staff began to scrutinize the basic reading, writing and computational skills of entering freshmen. The Board of Trustees found that the complaints it had received were bolstered by the tremendous losses in enrollment occurring between the freshman and sophomore years at Alcorn State University, Jackson State University and Mississippi Valley State University which indicated that substantial numbers of incoming students were either not capable of doing college level work or were simply unprepared.

As a consequence, the Board of Trustees staff embarked upon a review of institutional admission practices. The staff found that during academic years 1973-74, 1974-75, and 1975-76 the institutions had admitted students with ACT scores as low as 1 and 2. Alcorn State University, Jackson State University, and Mississippi Valley State University had enrolled significant numbers of students with ACT scores of 9 and below. Moreover, the three major doctoral granting universities had likewise admitted appreciable numbers of students achieving ACT

scores below 15. (Board Exhibit 176; Board Exhibit 177.)

The Board of Trustees attempted to address these concerns in May, 1976 by promulgating its first policy establishing minimum ACT scores for college admission to be effective the Fall of 1977. The policy stipulated that no student was to be admitted to any institution as a first-time freshman who failed to achieve an ACT score of 9. This first policy also provided that those institutions presently requiring higher minimum ACT scores were to continue those requirements. (Board Exhibit 179.) High school grades were not adopted as a component of the admission standards.

The admission standards were revised in the succeeding months to allow Mississippi State University, the University of Mississippi, and the University of Southern Mississippi to admit students with scores of 12, 13, and 14 on a probationary basis during the summer session. The policy revision provided that if such students maintained a "C" average during the summer, they were permitted to enroll in the fall semester.

In October, 1977, Dr. Walter Washington, President of Alcorn State University, requested the right to increase admission standards at that institution. Dr. Washington sought and obtained authority for step scale increases first from the 9 ACT test score to 11, then to 13, and it was hoped ultimately to a 15 ACT score by the fall of 1980. Dr. Washington simultaneously obtained, however, the right to admit students scoring 9, which is less than the otherwise applicable ACT minimum, up to a total number of students equal to 10% of the institution's previous year's fall enrollment. (Board Exhibit 179.)

The Board of Trustees again liberalized the admission standards in December, 1977. Responding to discussion that some students scoring below 15 on the ACT may nevertheless be capable of doing college work, the Board authorized Delta State University, Misssissippi State University, the University of Mississippi, and the University of Southern Mississippi to go as low as a composite score of 9 in admitting students on an exception basis. Such admissions were to be afforded under a "special talents" or "high risk" category.

In response to the continuing concerns of university faculty and staff regarding the quality of enrolling students, the Board of Trustees established in December of 1979 a comprehensive developmental studies program in an effort to improve the classroom performance of students identified as having deficiencies in certain subject matter and to improve retention rates. Low achievers, identified by ACT score, were required to enroll in and pass certain special remedial courses designed and implemented at each of the institutions of higher learning. Those enrolled in the remedial courses would then be permitted to "test out" of the program upon mastery of the courses.

By 1982, it appeared that the ACT minimums coupled with the developmental studies programs in place at each institution were not adequately addressing the problem of academically unprepared students enrolling in and graduating from the universities. As many as one-third of all freshman students were enrolled in remedial courses. At the same time, the Mississippi system of higher education was experiencing substantial budget cuts while expending approximately $1,000,000.00 per year for developmental studies and remedial programs.

In an attempt to positively influence the level of preparation of entering freshmen, the Board of Trustees adopted a policy which required as a prerequisite for admission the successful completion of certain essential academic courses at the high school level. It was determined that the completion of a "core curriculum" high school course program would raise the level of academic readiness and, when assessed in light of the achievement on the ACT, would provide a reasonable degree of assurance that entering freshmen would be prepared to attempt a university level education. In July, 1982, the Board of Trustees thus adopted a high school college preparatory program known as the "core curriculum" for actual implementation in the Fall of 1986 which consisted of required courses in high school in the sciences, math and English. (Board Exhibit 441.)

In July, 1984, the Board of Trustees approved the request of Dr. James Hefner, President of Jackson State University, to raise the ACT minimum score required for automatic admission to 12, and in February, 1986 the Board of Trustees approved a similar request to raise the standard to 13. Exceptional admissions for students scoring below these minimums were preserved. (U.S. Exhibit 849; U.S. Exhibit 851.)

In April, 1986, Mississippi Valley State University also advised the Board of Trustees of its desire to enhance its image as a quality institution by raising admission standards. The Board of Trustees approved the request of Dr. Joe Boyer, President of Mississippi Valley State University, to raise the minimum ACT score for automatic admission to 13. Dr. Boyer also requested and obtained increased flexibility, that is, 10% of the previous year's total fall

enrollment, for the admission of students scoring from 9 to 12. (U.S. Exhibit 852.)

Currently, the principal elements for admission to the state universities include (1) academic achievement in high school, (2) achievement on the ACT, and (3) junior college transfer procedures. All entering freshman students are required to have earned the following high school units in grades 9 through 12 in satisfaction of the core curriculum requirement: English—4 units; mathematics—3 units; sciences—3 units; social sciences—2.5 units; and required elective—1 unit. Deferral and exemption policies do exist, however, which permit student admission without satisfaction of all course requirements on an exceptional basis (such as a particularly high score on the ACT). The core curriculum requirement applies equally to all eight public universities, but the exemption policies are more liberal for the historically black institutions. No student may be admitted to a public university unless he or she satisfies the course requirements or falls under a deferral or exemption category. No particular grade point average is required—receipt of high school credit signifying course completion is all that is necessary. (Board Exhibit 183a, pages 4-6, 9, 12.)

The high school core curriculum and ACT score requirements apply only to the admission of first-time freshmen. Applicants who fail to satisfy either or both requirements may attend other accredited institutions of higher learning. Mississippi has numerous public junior colleges which offer automatic enrollment to high school graduates. Transfer from a junior college to the public universities may be made without satisfaction of the core curriculum or ACT score requirements. These students may transfer

after the completion of 24 hours at a junior college with a "C" average. In some instances, students without the requisite ACT score may transfer after satisfactory completion of as few as 15 hours at the junior college level. (Board Exhibit 183a, pages 8-12).

The Board of Trustees currently requires every Mississippi resident applicant under 21 years of age to take the ACT. No student who scores below 9 on the ACT is eligible for admission as a first-time freshman to any of the eight public universities. The minimum test score required for automatic admission varies among the institutions as do the available exceptions for admission of students who fail to achieve the ACT minimum score required for automatic admission.

The Board of Trustees requires a minimum of a 15 ACT composite score for automatic admission to Delta State University, Mississippi State University, Mississippi University for Women, the University of Mississippi and the University of Southern Mississippi. Exceptions do exist and flexibility is afforded, however, with respect to the minimum score. Each of the above institutions may enroll on an exceptional basis a number not to exceed 5% of the previous academic year's freshman class enrollment or 50 students (whichever is greater) to accommodate talented or high risk students with ACT composite scores of 9 to 14. (Board Exhibit 183a, page 9).

Mississippi University for Women has elected with the approval of the Board of Trustees to implement higher admission standards. Commencing the Fall of 1987, students seeking automatic admission to Mississippi University for Women must submit an ACT composite score of 18 or an ACT score of 15, 16 or 17 together with a high school grade point average of

3.0 on a 4.0 scale. Students scoring 15, 16 or 17 on the ACT without achieving a 3.0 grade point average in high school are considered for exceptional admission. No student who scores below 15 on the ACT is eligible for admission as a first-time freshman. (U.S. Exhibit 965, pages 91-99, 121-123.)

Applicants seeking automatic admission to Jackson State University must score a minimum of 13 on the ACT. Again, exceptions do exist and flexibility is afforded with respect to those applicants scoring from 9 to 12 on the ACT. As to these applicants, Jackson State University may enroll a number equivalent to 8% of the previous year's freshman class to accommodate those identified as talented or high risk students. Applicants with 9 to 12 ACT composite score who also have a 3.0 grade point average or who rank in the upper 50% of their high school graduating class are exempt from the 8% exceptional allowance. (Board Exhibit 183a.)

The Board of Trustees requires a minimum composite score of 13 on the ACT for automatic admission to Alcorn State University and Mississippi Valley State University. These institutions are likewise afforded substantial flexibility as to those applicants who score from 9 to 12 on the ACT. Applicants scoring in that range may be admitted but enrollment is limited to a number equivalent to 10% of the previous year's freshman fall term enrollment. (Board Exhibit 183a, pages 10-11.)

A. The American College Test (ACT)

Because black students on average score lower than white students, the plaintiffs allege that basing admission requirements on ACT scores discriminates unjustly against blacks.

The ACT was developed in the mid-West during the late 1950's as the nation entered into a period of substantial enrollment growth for colleges and universities. Today, every state has at least on institution making some use of the ACT data; the ACT is the predominant admissions test in some 28 states; over 20,000 educational institutions utilize the ACT assessment program; and over 1,000,000 students were tested this past year through the ACT assessment program. (Board Exhibit 162.)

The ACT assesses general educational development on a nationally standardized basis. The test shows at what educational stage the student is at the time of the test—not the innate ability or potential of the students but the present educational development. The test actually consists of a battery of four tests addressing the areas of English, mathematics, social studies, and natural sciences. These four tests measure the developed academic abilities deemed important for success in college. In addition to providing a highly relevant status report on student school achievement, the ACT, as a standardized instrument, enables educators to assess uniformly the level of academic preparation of students graduating from high schools across the state. The ACT further provides information necessary for student placement and serves as a valid predictor of academic performance during the first year of college. (Board Exhibit 162.)

The positive relationship between performance on the ACT and academic achievement during the freshman year at Mississippi universities is well established. The research services offered by ACT as well as the Board of Trustees generated tabular data correlating ACT scores and college grades. Both plainly evidence this positive relationship. (U.S. Exhibit 946,

pages 32-40; U.S. Exhibit 967, pages 75-78; Board Exhibit 275.)

Average ACT scores do differ among Mississippi black students as contrasted with Mississippi white students. Black students on the average score somewhat lower. Yet, this is not a Mississippi phenomenon but rather a national pattern. Scores on the ACT correlate with the socio-economic status of the student. It is not as much a racial correlation as an economic one. Dr. Thomas Satterfield, Deputy Superintendent of Education, State of Mississippi, testified that as more students, black and white, choose to take the core curriculum now offered by high schools in the state, the ACT score rises measurably. The studies have shown that fewer black students on a percentage basis choose to take the core curriculum than do whites, but as more blacks choose to take the curriculum, their scores are also higher than blacks and white who choose not to take it.

Differential scores can also be found according to the sex, age, and family income of students tested. (Board Exhibit 172, pages 3, 10; U.S. Exhibit 874, pages 7-8.) Nationally, 95% of all ACT-tested students scored 9 or above and over 70% of all students score 15 or above. (U.S. Exhibit 874, page 9.) Nine out of every ten ACT-tested students in Mississippi, including 80% of all black students, score 9 or above on the ACT; and students who achieve a 9 on the ACT English and social studies test are only reading at a ninth grade level. (Board Exhibit 190, pages 5-10.) Students scoring a 15 on the ACT are themselves only on the verge of a freshman reading level. (Board Exhibit 190, pages 5-10.) Thus, the Board-established minimum Act scores are extremely modest levels of required performance. Indeed, a United States expert

characterized scores of 10 and 11 as "drastically low" and certainly not reflective of a level of academic achievement for college work. (Board Exhibit 463, pages 160-61.)

Very few black students, if any, are actually denied admission to a Mississippi university as a first-time freshman for failure to achieve the minimal ACT score. Alcorn State University, Jackson State University, and Mississippi Valley State University did not deny admission to a single applicant for the fall of 1986 who scored 9 or above on the ACT. (U.S. Exhibit 960, pages 109-10.) Similarly, Mississippi State University did not deny admission to a single applicant scoring above 11 on the ACT and the University of Mississippi denied admission to only nine black freshman applicants who completed an application for admission. (U.S. Exhibit 964, pages 140, 144-45.) The University of Southern Mississippi has not admitted its full quota of students who score below 15 on the ACT in recent years due to an insufficient number of applicants in that category.

The admission standards now in place are more modest than the National College Athletic Association Proposition 48, the much publicized policy for college student athletes. The NCAA admissions policy requires achievement of specified ACT composite scores in order for student athletes to be eligible to participate in athletics. In 1986, student athletes could score as low as 13 and participate in athletics; in 1987, they may score as low as 14; but beginning in August of 1988, all student athletes must achieve an ACT composite score of 15 and at least a 2.0 grade point average on a 4.0 scale. Unlike the Board of Trustees' standards, there are no exceptions to this 15 requirement. Moreover, the current Board of Trustees policy

does not require students to achieve a 2.0 grade point average.

The Board's prescribed pre-college curriculum is an appropriate measure of academic progress and achievement in high school. (U.S. Exhibit 970, pages 49-54.) There is substantial evidence that the completion of the high school course requirements has resulted in a higher level of academic preparation for those students wishing to experience the rigors of academic life at the university level. Since the implementation of the high school "core curriculum," the necessity for developmental education in college has declined significantly and ACT scores have improved dramatically. (Board Exhibit 167, pages 8-9.) The mean ACT score in 1986 for black students who completed the high school college prepatory core curriculum was 14.3 while the mean score for those students not completing the core curriculum was only 10.8. (Board Exhibit 170.)

The modesty and reasonableness of the ACT score requirements for automatic admission are reinforced by the substantial flexibility afforded through exceptions to these minimum scores. (U.S. Exhibit 970, pages 58-59.) Each institution takes into account educational criteria in addition to ACT scores and high school courses completed in evaluating whether an applicant who has scored below the ACT threshold for automatic admission should be admitted. Grades, class rank, extracurricular activites, special talents, and recommendations of teachers and counselors are considered in attempting to identify students with reasonable prospects for academic success in college. (U.S. Exhibit 967, pages 66-71; U.S. Exhibit 961, pages 143-44; U.S. Exhibit 962, pages 145-51.)

b. Admission from Junior Colleges

Under the present policies, no applicant for first-time freshman admission to a public university is denied the opportunity to obtain a university degree for failure to achieve a particular ACT score, including the floor requirement of 9. At most, admission is deferred. Students may attend a public junior college, all of which have open admission policies, and then transfer to a senior college after successful completion of as few as 15 hours. (Board Exhibit 183A, page 8.) This procedure is not unreasonable or unduly burdensome. Indeed, thousands of students elect to attend junior colleges in Mississippi (Board Exhibit 185), and substantial numbers of these students subsequently transfer to public universities (U.S. Exhibit 965, pages 111-12, 117; U.S. Exhibit 001, page 27). In 1986, 60% of all the college students in Mississippi were enrolled in the junior colleges.

The defendants argue that the Act requirements currently in use are reasonable and constitutional and that medical, law and engineering hopefuls should be held to at least as high admission standards as the NCAA requires of tight ends.

2. Student Recruitment

Although all eight universities have admitted "other-race" students since the 1960's (see pp. 16-17), nevertheless the historically black institutions are still predominantly black and the historically white institutions are still predominantly white. The question before the court is whether the racial identities of these universities is a result of the present free choice of the students or of official state policies and practices to promote the continued historical racial identity of each university.

Those individuals at each of the institutions with responsibility for student recruitment are responsible for recruiting other-race students as well. In addition, universities employ other-race recruiters charged with specific responsibility for the recruitment of other-race students. Other-race students, faculty, and alumni participate in the institution's recruitment efforts. Multi-racial recruiting teams are frequently used. (Board Exhibit 105, page 5; Board Exhibit 069, page 5; Board Exhibit 044, pages 6-7; Board Exhibit 129, page 18.) The universities also make use of various recruitment brochures and other university publications which have an other-race emphasis and which seek to convey the institutions' commitment to other-race participation.(Board Exhibit 129, page 18; Board Exhibit 069, page 5, appendix; Board Exhibit 044, page 7; U.S. Exhibit 867, page 15; U.S. Exhibit 962, pages 19-20.) The universities also utilize news releases, promotional radio spots, public service announcements, newspaper advertisements, and slide presentations emphasizing other-race participation in university life. (Board Exhibit 033, page 4; Board Exhibit 046, page 12; Board Exhibit 071, page 3; Board Exhibit 077, page 8; U.S. Exhibit 962, page 19.)

Each of the universities initiates and maintains numerous contacts with high schools and junior colleges in their recruiting efforts. Each university strives to recruit at as many high schools and junior colleges as possible, including schools with substantial other-race enrollment. (Board Exhibit 021 through Board Exhibit 129.) High school counselors are informed of activities of special interest to minorities (Board Exhibit 129, page 18) and campus minority recruitment conferences in which minority students and counselors are asked to make campus visits.

(Board Exhibit 105, page 6; U.S. Exhibit 867, page 15.) The Board of Trustees does not permit the university to recruit at schools which fail to execute an agreement to allow multi-racial recruiting teams. (Board Exhibit 102, page 5; U.S. Exhibit 962, page 27; U.S. Exhibit 001, page 6.)

The recruitment of minority students appears to be a competitive business; both the historically white institutions and the historically black institutions continually strive to increase enrollment of other-race students. Recruitment efforts have resulted in the representation of blacks in the freshman classes at Delta State University, Mississippi State University, Mississippi University for Women, and the University of Southern Mississippi in statistical parity with the representation of blacks in the qualified applicants pools. Qualified blacks and qualified whites are equally likely to apply, be accepted, and enroll at these universities. (Board Exhibit 192; Board Exhibit 193.) Black students who choose to enroll at a historically white university appear to perform well and are well received. Dr. James McComas, President of the University of Southern Mississippi, the second largest of the eight institutions, testified that a larger percentage of the black students who return as sophomores after their freshman year go on to graduate on time than do the same category of white students. Black students at the University of Southern Mississippi have been elected Homecoming Queen, Mr. University of Southern Mississippi, and to the Hall of Fame.

C. Faculty Recruitment

The statistical presence of other-race faculty at the historically black institutions is substantial and unchallenged. Approximately 32% of Alcorn State

University's faculty is white, at Jackson State University 33% of the faculty is white, and at Mississippi Valley State University approximately 26% of its faculty is white. (U.S. Exhibit 742a; U.S. Exhibit 742c; U.S. Exhibit 742(f).) The defendant universities recruit and hire faculty on a nationwide basis. (U.S. Exhibit 946, page 122; U.S. Exhibit 969, pages 12-13; U.S. Exhibit 963, page 20.) The historically white institutions expend substantial affirmative efforts in an attempt to attract and employ other-race faculty, including (1) publication of position availability in the *Chronical of Higher Education*, as well as in publications specifically addressing minority interests, such as the *Affirmative Action Register*, *Equal Opportunity Forum*, and *The Black Scholar* (U.S. Exhibit 969, page 14; U.S. Exhibit 946, page 114; U.S. Exhibit 758), (2) publication of position availability in the specific discipline periodicals for which there is an open position (U.S. Exhibit 959, page 13), (3) mailings to and distribution of vacancy notices among the institutions of higher learning, (4) announcements placed with regional and national meetings of disciplines in which openings exist (U.S. Exhibit 758), (5) establishment of distinguished professorships, employment of visiting professors, and presentation of black guest lecturers and visiting scholars (Board Exhibit 041, page 18; Board Exhibit 104, pages 27, 32), (6) special funds allocated to minorities for salary incentives, supplementation, and support (U.S. Exhibit 946, page 115), and (7) organizing and funding committees specifically responsible for minority recruitment (Board Exhibit 104, page 26).

Recruitment of minority faculty is severely hampered by the acute shortage of supply of minority individuals having the requisite qualifications. For

example, from 1977 to 1982, out of 1,067 Ph.D's awarded in chemical engineering in the United States, only 6 or less than 1% were awarded to blacks; out of 1,679 Ph.D's awarded in electrical engineering, only 29 or less than 2% were awarded to blacks; and in European history, a field included within the social sciences where blacks are generally best represented, out of 1,165 Ph.D's awarded, only 6 or less than 1% were awarded to blacks. Moreover, business and industry keenly compete with educational institutions for the extremely limited number of blacks who hold terminal degrees. Further, the push to employ more minority faculty is a nationwide issue. Institutions throughout the country are competing for the same limited supply and finding it extremely difficult to increase the percentage of other-race faculty. Mississippi universities are at a distinct competitive disadvantage in attempting to attract, employ, and retain qualified black faculty members. Due to Mississippi's difficulties in funding higher education, faculty salaries are not competitive with many larger universities; faculty salaries tend to be several thousand dollars below national averages; and salary increases for faculty have been proportionately lower than in surrounding states where the higher education dollar is not spread among so many institutions with duplicate programs. Non-competitive salaries are significant with respect to the recruitment of minority faculty due to the limited supply and great demand for minority faculty throughout the country which affords the black faculty member substantial leverage in financial negotiations.

The high demand for black faculty makes it difficult to retain those who are hired. Institutions outside Mississippi are frequently able to lure black

faculty away with more financially attractive opportunities after the teachers have gained needed experience in Mississippi institutions. (U.S. Exhibit 969, page 10; U.S. Exhibit 963, pages 22-23.)

Since 1974, the percentage of blacks hired by Mississippi universities exceeded the black representation in the qualified labor pool. There were some 53 more blacks hired in faculty positions than one would have expected given the representation of blacks in the qualified labor pool, and this pattern holds at each of the five historically white institutions. (Board Exhibit 430; Board Exhibit 214 through Board Exhibit 217; Board Exhibit 431.) Moreover, even though the turnover rate for black faculty is higher than for whites, the representation of blacks among the faculty at each of the five historically white institutions is statistically in line with the relevant labor market for faculty employment since 1974. (Board Exhibit 207 through Board Exhibit 212.)

D. Institutional Mission & Academic Programs

1. Program Offerings and the Assignment of Institutional Missions

The plaintiffs have alleged that segregation has been perpetuated by the Board assigning the historically white universities more comprehensive undergraduate and graduate programs offering doctoral degrees than assigned to the black universities, thus discouraging white students from attending black universities.

As stated above, at the time the Board of Trustees issued the Brewton Report in 1954, higher education opportunities for blacks in the State of Mississippi were limited to the three black colleges which offered undergraduate training in the areas of

teacher education, agriculture, mechanical arts, and the practical arts and trades. The white population was served by five colleges, which offered a variety of undergraduate programs complemented by extensive offerings on the graduate and professional levels. (U.S. Exhibit 29, page 148.) By the mid-1960's all five of the historically white institutions offered graduate work. Jackson State University was the only historically black institution that offered graduate work. (U.S. Exhibit 29.)

From 1967 through 1984, Jackson State University experienced a tremendous period of growth in both the number and types of academic programs offered. Academic programs were established in such fields as industrial technology, computer science, mass communications and meterology. Five schools—the School of Business and Economics, the School of Education, the School of Liberal Studies, the School of Science and Technology and the Graduate School—were established. The Graduate School grew from a single master's degree in school administration to 35 master's degrees, 15 specialist's degrees and a doctorate in early childhood education. Accreditations grew from regional accreditation by the Southern Association of Colleges and Schools to numerous national professional accreditations in such areas as teacher education, industrial technology, rehabilitation education, chemistry, social work, art design, music and public affairs and administration. (Board Exhibit 463, pages 108-09).

By 1981, the three comprehensive historically white institutions (Mississippi State University, the University of Mississippi and the University of Southern Mississippi) offered more programs than the three historically black institutions. There was

comparability, however, in the number of program offerings between the regional universities of Alcorn State University and Mississippi Valley State University on the one hand and the two remaining historically white institutions, Delta State University and Mississippi University for Women. No historically black institution then and now offers a professional degree in programs such as law, medicine, dentistry, or pharmacy. (U.S. Exhibit 682.) Jackson State University is the only historically black institution that offers degree programs above the specialist level. (U.S. Exhibit 684.)

As a consequence of the 1974 Plan of Compliance and in conjunction with the academic program review process commenced in 1980, the Board of Trustees in 1981 attempted to define the role and scope of its eight public universities in a document entitled "Mission Statements." (Board Exhibit 274). The document presented a trichotomous classification scheme labeling each institution either "comprehensive," "urban," or "regional." It is common within higher education practices to classify universities according to "mission"—a term synonymous with "role and scope." Such classifications are generally based on the number and level of degree programs offered by an institution, the fields in which degrees are granted, the extent to which an institution conducts and receives funding for research, and areas of public service responsibility. The assignment of missions among institutions of higher learning is in fact necessitated by limited financial resources in the higher education budgets. All institutions cannot offer terminal degrees in all fields. Missions and special fields of excellence must be assigned.

Dr. James Millett, former President of the University of Miami (Ohio) and Chancellor of the Ohio

Board of Regents, testified that every state Board struggles with the task of assigning missions to its universities—that is, every state save one. Wyoming has no such problem because it has only one state university. Dr. Millett testified, and the court so finds, that the missions assigned to the regional black colleges and the regional white colleges should depend on the financial resources of the state. According to Dr. Millett, some black students feel more comfortable and the cultural and social atmosphere for education is better for some at black colleges than at large, comprehensive universities; and that, therefore, black colleges do have a place so long as blacks also have equal access to the large, comprehensive universities and the state has sufficient funds to maintain the black colleges and their duplicating, overlapping programs of higher education.

The Board of Trustees thus designated Mississippi State University, the University of Mississippi and the University of Southern Mississippi as "comprehensive" universities which implied that these institutions offered the greater number and higher level of degree programs than did the remaining institutions. The comprehensive designation also implied that each institution was expected to offer a number of programs on the doctoral level but not in the same disciplines. Leadership responsibilities in specific disciplines have been assigned to each comprehensive university in order to promote program quality and the efficient utilization of limited resources. (Board Exhibit 274; U.S. Exhibit 683, pages 3-8.)

As the only university designated as an "urban" university, Jackson State University's role has been defined as one oriented toward service of the urban community, that is, the City of Jackson. Its mission

is to instruct in research and public service with particular emphasis on the needs of the urban community in which it is located. (Board Exhibit 274.) In 1981, and at the present time, the number and level of programs offered at Jackson State University were, and are, significantly greater than the average offered at the "regional" Mississippi institutions, Delta State University and Mississippi University for Women, but less than that offered at the "comprehensive" institutions.

Alcorn State University, Delta State University, Mississippi University for Women and Mississippi Valley State University have received the designation of "regional" universities. The "regional" designation signifies a more limited programmatic focus for these institutions, that is, each is expected to restrict course offerings to quality undergraduate instruction. Apart from Alcorn State University's land grant activities, research and public service responsibilities are to be limited. (Board Exhibit 274; U.S. Exhibit 683, pages 10-12).

2. Program Reduction and Program Duplication

In 1980, all programs below the doctoral level except certain professional programs were subjected to an intensive six-year review. (Board Exhibit 263, chapter 1 and 2.) Implementation of the review process included: (1) an exhaustive review by the Board's staff of the program review literature and instruments utilized in previous program reviews conducted across the nation; (2) compilation of review documents covering the scope of prospective reviews; (3) pilot review of a selected few programs to test the process; (4) following pilot review, documentation of operational procedures for the review

(Board Exhibit 266); (5) employment of professional consultants to review each program; and (6) uniform utilization of data-gathering instruments addressing such factors as program need, program demand, student enrollment, courses taught, faculty qualifications, degree requirements, degrees awarded, employment of graduates, program relationship to institutional mission, and program costs (Board Exhibit 268; Board Exhibit 269).

As a result of this review process, the Board ordered a substantial decrease in the number of programs, across degree levels at both the historically black and the historically white institutions. The average number of programs offered at the historically white institutions decreased from 77 to 52 at the bachelor's level, 47 to 32 at the master's level, 9 to 4 at the specialist's level, and 12 to 11 at the doctoral level. With respect to the historically black institutions, the average number of programs decreased from 42 to 29 at the bachelor's level, 12 to 10 at the master's level, and 4 to 3 at the specialist's level. Overall, a total of 43 programs were eliminated at the three historically black institutions between 1981 and 1986 and a total of 227 programs were eliminated at the five historically white institutions over the same time period. (U.S. Exhibit 685, page 87; U.S. Exhibit 685(v).)

The program reductions also had the effect of reducing the amount of program duplication which had existed within the Mississippi system of higher education prior to 1981. As of 1986, however, program duplication persisted. Program duplication refers to those instances in which broadly similar programs are offered at more than one institution. A program is defined as necessarily duplicated if the presence of that program is essential for the provision of general

education or specialized education in the basic liberal arts and sciences at the baccalaureate level. Program duplication and necessary duplication refer to the core programs, that is, programs that are considered to be essential. Unnecessary duplication refers to those instances where two or more institutions offer the same nonessential or noncore program. Under this definition, all duplication at the bachelor's level of nonbasic liberal arts and sciences course work and all duplication at the master's level and above are considered to be unnecessary.

In assessing the amount of unnecessary program duplication existing within the Mississippi system of higher education today based upon a comparison of the historically black institutions and the historically white institutions, disregarding institutional mission and demand for programs, it is found that at the bachelor's level, 34.6% of the 29 programs offered at the historically black institutions are unnecessarily duplicated by the historically white institutions. At the master's level, 9 of the 10 programs (or 90%) offered at the historically black institutions are unnecessarily duplicated at the historically white institutions. There also exists a substantial degree of unnecessary program duplication at the specialist level between the historically black and historically white institutions. (U.S. Exhibit 685(f)(g). The historically white institutions as a group have lower percentages of duplication than the historically black institutions since the historically white institutions offer more programs than are offered at the black institutions. (U.S. Exhibit 685, page 11; U.S. Exhibit 685(c).)

Assessing the amount of unnecessary program duplication existing between the comprehensive versus

noncomprehensive universities without consideration of the historical racial designation of the institutions, the court finds that at the bachelor's level 39.1% of all courses offered at the noncomprehensive universities are duplicated or also offered at the comprehensive universities. At the master's level, 87.9% of the programs offered at the noncomprehensive universities are also offered at the comprehensive universities.

Considering the amount of unnecessary program duplication existing between the comprehensive universities versus the historically black and the historically white noncomprehensive universities, the court finds that 32.7% of the programs offered by the historically black universities at the bachelor's level are unnecessarily duplicated by the comprehensive universities. At the master's level, 86.2% of the programs offered by the historically black universities are unnecessarily duplicated by the comprehensive universities. On the other hand, 48.9% of the programs offered by the historically white noncomprehensive universities at the bachelor's level are unnecessarily duplicated by the comprehensive universities. At the master's level, 92.9% of the programs offered by the historically white noncomprehensive universities are unnecessarily duplicated by the comprehensive universities. Thus, a higher percentage of unnecessary program duplication exists between the historically white noncomprehensive universities vis-a-vis the comprehensive universities than exists between the historically black universities and the comprehensive universities. (Board Exhibit 262.) Needless to say, this large amount of unnecessary duplication of programs at institutions which in some cases are less than 50 miles apart in sparsely populated areas is not a model of economic efficiency. For

example, the unnecessary duplication of programs and administrations by two noncomprehensive universities, Delta State and Mississippi Valley State, only 35 miles apart in the rural, financially strapped Mississippi Delta, cannot be justified economically or in terms of providing quality education; and the unnecessary duplication by Mississippi State University and Mississippi University for Women, only 20 miles apart in the eastern hill section of the state, cannot be justified on an economic or efficiency basis; however, this case is not about the efficiency or the economic wisdom of higher education policies. It is about the charge of racial discrimination in higher education.

With respect to the relative quality and quantity of programs offered, library volumes, and number of faculty with doctorates and degrees from major research institutions, differences do exist among the institutions. However, these differences do not appear to be associated with traditional institutional racial designations but simply correlate with whether an institution is comprehensive or noncomprehensive. Furthermore, there is no pattern in program quality among the noncomprehensive universities with respect to race. (Board Exhibit 205; Board Exhibit 206; Board Exhibit 224-228; Board Exhibit 238; Board Exhibit 241; Board Exhibit 244; Board Exhibit 247; Board Exhibits 258-261.)

3. Off Campus Program Offerings

The plaintiffs charge that the Black universities are kept in a secondary, segregated class by the off-campus centers set up by comprehensive universities near the campuses of the black universities, thus discouraging whites in the area from enrolling in the black institutions.

a. The University Center at Jackson

On February, 1951, the Board of Trustees approved the establishment by the University of Mississippi, in cooperation with Millsaps College, a private institution, of an off-campus center on the Millsaps campus in Jackson, Mississippi, the location of Jackson State University. Beginning in the Summer of 1951, the University of Mississippi offered credit and noncredit adult evening courses at the Millsaps Center. Enrollment at the Center during the period 1956 through 1966 ranged from a high of 975 in Fall, 1958 to a low of 284 in Fall, 1962. (U.S. Exhibit 913, stipulations 1, 2, 6.)

In April, 1961, the Board of Trustees authorized Mississippi State University to establish a resident center at Belhaven College, a private Presbyterian college in Jackson, Mississippi. During the 1964-65 academic year, 86 courses were offered and enrollment reached 960 at the Belhaven Center. In the Fall of 1964, the University of Southern Mississippi also began offering courses in cooperation with Mississippi State University at the Belhaven Center. (U.S. Exhibit 913, stipulations 8, 9, 12, 13.)

In May, 1964, the Executive Secretary of the Board of Trustees and the Director submitted to the Board of Trustees for its approval an agreement signed by officials of the University of Mississippi, Mississippi State University and the University of Southern Mississippi to establish a cooperative center in Jackson, offering an improved program of continuing education for residents of the immediate area. (Private Plaintiffs Exhibit 367, stipulation 17.) In December, 1966, the consolidation of the three Jackson extension centers was authorized by the Board of Trustees and early the next year the Mississippi University

Center in Jackson was established and was to be operated jointly by the three universities. The establishment of the University Center constituted a merger of the Jackson resident centers previously operated by the three universities. The granting of degrees at the University Center was not authorized at that time. (U.S. Exhibit 913, stipulation 21).

On May 18, 1972, the Board of Trustees voted to assign management responsibilities for the University Center to Mississippi State University, the University of Mississippi and Jackson State University. On September 21 of the same year the University Center was given degree-granting status. The plaintiffs alleged that the operation of this center near Jackson State University competes with Jackson State and tends to perpetuate the alleged segregated system. The Plan of Compliance of May, 1974, proposed to diminish the competition between Jackson State University and the programs offered by the historically white universities at the University Center. At present, Jackson State University enjoys on-campus privileges at the University Center and retains veto authority over all programs offered at the Center by the remaining institutions. Only limited graduate and unique offerings of the historically white institutions remain.

b. The Natchez Center

The University of Southern Mississippi's request to establish a resident center in Natchez, Mississippi, near Alcorn State University, was approved by the Board of Trustees on June 21, 1962. The Natchez Center enrolled its first students in the Fall of 1962. The curriculum was designed to offer adult students three years of undergraduate work at Natchez and contemplated a final year of studies—either at the

main campus in Hattiesburg or at any other Mississippi University upon transfer. During the Fall term of 1962, there were 198 students attending 14 classes at the Natchez Center. The Center is located approximately 40 miles from Alcorn State University. (U.S. Exhibit 912, stipulation 206; U.S. Exhibit 913, stipulation 204.)

The Board of Trustees subsequently assigned the management responsibility for the Natchez Center to the University of Southern Mississippi and approved the granting of baccalaureate degrees at the Center in the fields of elementary and secondary education and business administration—all of which were offered by Alcorn State University. The Board of Trustees, in 1972, instructed the presidents of the University of Southern Mississippi and Alcorn State University to meet and "establish the procedures whereby Alcorn [State University] will participate significantly in the instructional programs of the branch campus in Natchez." (U.S. Exhibit 913, stipulation 223.) The Plan of Compliance called for the joint participation of the two universities at the Natchez Center, making specific provision that Alcorn State University would teach 25% of the baccalaureate and master's degree courses offered at the Center. (U.S. Exhibit 913, stipulation 366.)

On Februray 17, 1977, the Board of Trustees transferred all responsibilities of the nursing program then offered by the University of Southern Mississippi at the Natchez Center to Alcorn State University. At present, the University of Southern Mississippi offers only noncredit extension courses at the Natchez Center.

c. The Vicksburg Resident Center

The Mississippi State University extension programs located at Vicksburg, Mississippi were recognized by the Board of Trustees as a resident center in May of 1952. (U.S. Exhibit 912, stipulation 733.) Prior to 1972, Mississippi State University offered extension classes at the Vicksburg Center as part of an in-service training program for Vicksburg public school employees. In October, 1979, Alcorn State University was authorized by the Board of Trustees to offer several courses at the Vicksburg Center. (U.S. Exhibit 912, stipulation 739.) The next year a consortium arrangement between the two schools was approved. (U.S. Exhibit 912, stipulation 737.) During the 1984-85 school year, 19 students were enrolled at the Vicksburg Resident Center, and 48 were enrolled in the center's engineering program. (U.S. Exhibit 914, page 15.)

E. Mississippi State University and Alcorn State University

The Land Grant Activities

Allegations were made by the plaintiffs that the state discriminatorily on the basis of race deprives Alcorn State University of funds and support in favor of Mississippi State University. Both of these institutions are land grant institutions. A land grant institution is defined as a college university entitled to financial and programmatic support from the federal government pursuant to a series of statutes originating with the Morrill Acts enacted by Congress in 1862 and 1890. The Morrill Act of 1862 allowed states to either sell federal land equal to 30,000 acres and place the proceeds into an endowment, or to receive scrip in lieu of land. The colleges so set up were to teach agricultural and mechanical arts, in addition to the traditional courses of study. The next major piece of legislation, entitled the Hatch-George Act, passed by Congress in 1887, (referencing the Morrill-Wade Act, authorized the appropriation of funds to support agricultural research. In 1914, Congress passed the Smith-Lever Cooperative Extension Act, providing for agricultural extension for farmers. These three congressional acts defined the land grant college to be an institution that provides instruction in agriculture and mechanical arts, research in agriculture through the experimental stations, and extension of knowledge to farmers through cooperative extension programs. In 1890, Congress passed the second Morrill Act which allowed states at their discretion to designate institutions to provide educational opportunities for blacks in agriculture.

Like many states, Mississippi has two land grant universities. Mississippi State University, established in 1878, as an agricultural mechanical arts college, has, since its inception, served as the institution designated by the state to receive federal funds pursuant to the first Morrill Act. Alcorn State University serves as the state's 1890 institution, that is, the land grant institution designated by the state to receive funds pursuant to the second Morrill Act.

In 1888, the state accepted the provisions of the 1887 Hatch Experimental Station Act and gave Mississippi State University the authority to receive and expend such funds. Alcorn State University was given no powers relative to the Hatch Act even though the congressional enabling legislation did not limit the state to granting this power only to Mississippi State University, but allowed for the inclusion

of Alcorn State University. (U.S. Exhibit 913; U.S. Exhibit 695(a), page 2.) In 1916, the Mississippi Legislature accepted the provisions of the Smith-Lever Cooperative Extension Act of 1914 and gave Mississippi State University the exclusive authority to receive and expend such funds. (U.S. Exhibit 912.) The State of Mississippi was not required by the federal enabling legislation to allocate this function equally to the 1862 and 1890 institutions. One year later, the experimental station and cooperative extension programs were placed under the administrative control of Mississippi State University. (U.S. Exhibit 695(a), page 3.) In 1942, Mississippi State University was authorized to acquire land through the experimental station that was later renamed the Mississippi Agricultural and Forestry Experimental Station (hereinafter referred to as "MAFES"). It was not until 1972 that Alcorn State University was authorized by state legislation to conduct a branch experimental station at Alcorn. (U.S. Exhibit 695(a), pages 4-5). The Alcorn Branch Experiment Station is funded by the State of Mississippi through MAFES. The Alcorn Branch Experiment Station is an organizational unit of MAFES which is in turn an organizational unit of Mississippi State University.

1. Instruction

Consistent with congressional directives, federal support for instruction in agriculture, while limited, is and has been equally divided between Alcorn State University and Mississippi State University. The state funds for instruction are allocated by the Board of Trustees according to a funding formula. The court finds that the state funding for instruction in agriculture is based on objective educational criteria,

and that the financial allocations to Alcorn State University and Mississippi State University are educationally sound and reasonable and not affected by racial considerations.

2. Research

The state's program of agricultural research is heavily concentrated at Mississippi State University. The genesis of this agricultural research activity was the Hatch Act of 1887, which provided for the creation of agricultural experiment stations in connection with the first Morrill Act colleges. Since 1888, by state statute and with federal concurrence, Hatch Act funds received by the state have been assigned to Mississippi State University for support of the state's experiment station. *See* Miss. Code Ann. § 37-113-17 (1972). The McIntyre-Stennis Act of October 10, 1962 (16 U.S.C. § 582a, *et seq.*) provided for a program of forestry research at agricultural experiment stations established under the first Morrill Act and the Hatch Act. Hatch Act funds, McIntyre-Stennis Act funds, and state matching funds are expended and accounted for by MAFES. MAFES, charged by federal and state policies to discover new knowledge for public benefit, is an integral part of Mississippi State University and yet is a separately funded entity. MAFES is funded at the state level by direct legislative appropriation and not by Board of Trustees allocation of general funds for higher education.

The United States Department of Agriculture (USDA), through its Cooperative State Research Service Division (CSRS), oversees the state research program. Federal appropriations are administered by CSRS which provides direction and control to state experiment stations throughout the country, admin-

isters research on a regional basis, and oversees a national system of agricultural research. No evidence was offered to suggest any discriminatory purpose, intent or effect in connection with Mississippi's role in agricultural research. For many years, MAFES has had a working relationship with faculty and administration in agriculture at Alcorn State University. Beginning in the late 1960's and formalized in 1971, MAFES and Alcorn State University joined in an effort resulting in the creation of the Alcorn Branch of MAFES. This was "forward" legislation serving as a model for other states.

Prior to 1967 the role of 1890 institutions was principally the teaching of agriculture and related subjects. In 1967 some limited research funds were earmarked by Congress for such institutions; these appropriations were increased in 1972 and were appropriated directly to the 1890 institutions under the 1977 Farm Bill (7 U.S.C. § 3101, *et seq.*). Section 1445 of the Farm Bill appropriated funds for agricultural research at 1890 colleges and simultaneously required the director of the state agricultural experiment stations and the research director of the 1890 institutions to jointly develop a comprehensive program of agricultural research for the state. Pursuant to this directive, MAFES and Alcorn State University jointly coordinated the development of a statewide comprehensive program; Alcorn State University also conducts its own research program and conducts research through its participation in the Alcorn Branch of MAFES. All officials directly involved in experimental station programs in Mississippi characterize the relationship between Mississippi State University and Alcorn State University as excellent. Alcorn State University has received limited state legislative appropriations for agricultural research since 1971.

3. Cooperative Extension

Cooperative extension is a cooperative venture among the USDA, land grant colleges, and county government, jointly financed by Congress, state legislatures, and county governments. Cooperative extension began with the Smith-Lever Act of May 8, 1914 (7 U.S.C. § 341, *et seq.*) and now encompasses four areas: agricultural and national resources programs; home economics or family living; 4-H youth development; and community development. The purpose of state cooperative extension is to help farm families improve their farm operations, to help farm-related businesses improve their operations, to help individuals gain knowledge to improve family living, and to improve rural community life. Since 1916, by state statute and with federal concurrence, Smith-Lever funds received by the state have been assigned to Mississippi State University. *See* Miss.Code Ann. § 37-113-19 (1972). The Mississippi Cooperative Extension Service (hereinafter referred to as "MCES"), an off-campus educational arm of Mississippi State University and separately funded by federal, state, and county governments, is the entity administering the Mississippi extension program. *See generally Wade v. Mississippi Cooperative Extension Service*, 372 F.Supp. 126 (N.D.Miss.1974). MCES is funded at the state level by direct legislative appropriation and not by Board of Trustees allocation of general funds for higher education.

The Extension Service of the USDA administers direction and control for the state program, including detailed plans of work and financial reports. No evidence was offered to suggest any discriminatory pur-

pose, intent or effect in connection with the state's role in cooperative extension work, that is, that access to cooperative extension programs is in any way influenced by racial considerations.

For many years, MCES has operated a branch at Alcorn State University. Beginning in 1970, Congress earmarked extension funds specifically for 1890 institutions, and under the 1977 Farm Bill certain federal funds were appropriated directly to those institutions. Section 1444 of the Farm Bill appropriated funds to 1890 colleges for extension, stipulating that the work to be carried out would be submitted as part of the State Plan of Work, and Congress directed that the state director of the cooperative extension service and the extension administrator of the 1890 institution jointly develop a comprehensive program of extension for the state. This in fact occurs between MCES and Alcorn State University with the result that, with MCES cooperation, Alcorn State University conducts its own extension work serving small-scale farmers in 13 counties and participates in the development of the state-wide comprehensive program. The Extension Service insures that the MCES and Alcorn State University extension programs are supplementary to one another rather than duplicative. Alcorn State University receives limited state legislative appropriations for cooperative extension work.

F. Funding of the Eight Universities

The plaintiffs allege in this suit that the black citizens are deprived of equal protection of the law because of discriminatory funding of the eight universities which favors the traditionally white universities over the traditionally black universities. State funding for general support of the basic educational and

operating activities of the eight universities is provided in the form of an annual lump sum appropriation to the Board of Trustees. It is the Board of Trustees' responsibility to allocate the general support appropriation among the respective institutions. Miss. Code Ann. § 37-101-15 (1972). The general support appropriation does not include funds for capital improvements, the Mississippi Agricultural and Forestry Experiment Station, or the Mississippi Cooperative Extension Service.

The Board of Trustees employs a budgeting equation referred to as the "funding formula" as the primary basis for determining the level of support for each university. Instruction-based, the Mississippi formula is tied to the educational activities of the universities. Such funding formulas are commonly used in higher education throughout the nation. The Board of Trustees has utilized the present instruction-based model since 1974.

Budgetary allocations to each university are based on the number of the previous year's student credit hours multiplied by the dollar rate per student credit hour with allowances made as to the field and level of study and mission of the institution. This figure, referred to as "investment in instruction," is deemed to be a specified percentage of an institution's total educational and general need with this percentage varying according to the mission of the institution. Following calculation of investment in instruction, other educational and general needs are determined, an appropriate inflation factor is applied to render the calculation current, and deductions are made for funds to be self-generated by the institutions, again according to mission.

The Board of Trustees determines investment in instruction by field of study for the reason that some disciplines and programs are less expensive to teach than other disciplines. Also, the Board of Trustees calculates instruction investment by level of study since lower level classes (freshman and sophomore) are less expensive than upper-level instruction (junior and senior) and substantially less expensive than graduate study. The institutional groupings are made according to mission not only because of such differences in program offerings but also due to significant distinctions in research and public service responsibilities.

In determining the cost of instruction at each of the institutions of higher learning, the Board of Trustees examines the number of programs and courses taught the previous year at a given institution, the current academic year, and the actual credit hours generated by those classes for each level of study. When the Board of Trustees receives this information from each university at the end of each academic year, Board employees then visit each campus and audit the courses to verify the accuracy of the credit hour activity report. From this information the Board of Trustees determines what the cost per credit hour is at each institution. Once cost per credit hour is established in each of the various disciplines for each level of study, the institutions are grouped by mission and then the average cost per credit hour for each group is calculated.

There are three groups for the purposes of making average cost estimates. Group I consists of the comprehensive universities. Group II is the urban university, Jackson State University. Since there is only one university with that mission designation, the

Board of Trustees decided to include also the University of Southern Mississippi for the purposes of establishing an average. The Board of Trustees justifies the inclusion of the University of Southern Mississippi with Jackson State University on the basis that it is the closest to Jackson State University in size in terms of number and level of programs. Group III includes the remaining institutions, that is, the regional universities, including Alcorn State University, Delta State University, Mississippi Valley State University, and Mississippi University for Women. An average group rate for each of these groups is thus determined and then applied to the total credit hours taught at the individual universities. Multiplying total credit hours taught times the average group rate will yield the cost in instruction at each university.

The formula group rate for instruction, as determined by the formula, is then set at a certain percentage of total need. Cost for instruction is said to represent 45% of the total need for the comprehensive universities, 47.5% for the Group II institutions, and 50% for the Group III institutions. This amount is then expanded by a certain percentage in order to cover all other functional areas, such as research, public service, student services, operations, and maintenance, and institutional support. Again, this percentage is set according to mission classification. Thus, cost in instruction for Group I institutions, representing 45% of total need, is expanded by 55% to cover the other functional areas. At the Group II institution, the cost in instruction is expanded by 52.5% and the Group III institutions' cost in instruction is then expanded by 50%. The resulting figure is then expanded again to take into account inflation since the figures used in calculating institutional need are

based on the previous year's data. Finally, each institution is expected to self-generate a portion of its budget. Group I institutions are expected to generate approximately 32% of their total need; these amounts are to be derived from student fees, other sales and services of educational activities, and charges for public service activities. The Group II institution is expected to self-generate 30% of its budget needs, and the Group III institutions are expected to self-generate 26% of their budget needs. Deducting the self-generated amount as described above will yield the total request for appropriations for the particular institution for the upcoming academic year.

The court heard expert witnesses testify pro and con on the issue of whether the present funding formula unconstitutionally discriminates against the predominantly black universities and therefore against the plaintiffs themselves. Studies have shown that the quality of educational institutions has not risen dramatically until they have attained considerable size—usually surpassing 10,000 full-time students. Instead of trying to divide more evenly the limited annual appropriation received by the Board of Trustees, it appears to the court that the Board would do well to build the quality and size of one of the comprehensive universities to that of universities in adjacent states which have created one leading flagship institution for the state, e.g., University of Arkansas, University of Tennessee, and Louisiana State University. Then the students of the state, black and white, would have educational opportunities available to them from at least one leading research university which do not now exist with scattered competing institutions clamoring for larger parts of the limited lump sum appropriation. The state is not required by the United States Constitution to maintain even a single university, and

a fortiori, not eight. Of course if a state chooses to create and maintain public universities it must fund and administer them without regard to race or sex. *MUW v. Hogan*, 458 U.S. 718, 102 S.Ct. 3331, 73 L.Ed.2d 1090 (1982). The establishment of a large, comprehensive, research institution which is open to all the qualified citizens of the state without consideration of race is a course of action not in contradiction to the Constitution or the laws of the United States. Politically, to channel the amount of money from the annual appropriation necessary to develop and support a flagship university, although economically and educationally advantageous to the state, would be an unpopular action with some alumni and in the areas served by the other universities if it would decrease the funding of the other seven. The Board of Trustees has recognized that the students of this state would have higher quality educational opportunities if funds are taken from institutions whose continued funding is economically illogical and use them in improving the larger comprehensive institutions;[3] however, the legislature has not agreed on a course of action in which the economic and educational advantages clash with the political considerations.

The funding formula does not treat the predominantly black institutions inequitably. Mississippi Valley State University, for example, benefits substantially under the institutional groupings. The grouping of Mississippi Valley State University with the other three regional universities, particularly Delta State University, has given Mississippi Valley

[3] The Board announced its decision in 1986 to close Mississippi University for Women, Mississippi Valley State University, the Veterinary School at Mississippi State University, and the Dental School at the University of Mississippi.

State University significantly higher funds for instruction than the sums actually expended for instruction. Conversely, Delta State University has been consistently funded at rates below sums actually expended for instruction. (Board Exhibits 361-364.) Jackson State University has also greatly benefited from having been grouped with the University of Southern Mississippi. (Board Exhibits 361-364.)

The Board of Trustees has on occasion departed from the pure formula allocation. Such departures, however, have benefited the predominantly black institutions. For the period 1981-82 through 1986-87, Mississippi Valley State University received $1,518,923.00, Alcorn State University received $1,101,167.00, and Jackson State University received $552,759.00 more than otherwise would have been received under a pure formula allocation. During the same time period Mississippi State University received some $4,134,846.00 less, and the University of Southern Mississippi $3,775,936.00 less than called for by the formula. (Board Exhibit 360.)

Comparing Mississippi institutions with their peers in surrounding states, the court finds that the three comprehensive universities were under-funded by more than 15% when compared to institutions of similar mission in the Southeast region. Jackson State University, however, was 9% above the regional average for like institutions, and the four regional institutions in Mississippi were more than 25% above the regional average for institutions of comparable mission in other states. Similar patterns have prevailed in Mississippi at least over the past decade. The plaintiffs have argued and alumni have called for a change in the funding of the universities which would allow the smaller predominantly black

universities to "keep up" with or "compete" with the larger predominantly white universities. The court notes that even respected newspapers have editorialized in favor of this position.[4] Such an argument is misplaced. A regional institution has a mission, a purpose, that is not designed for the "keeping-up" with or "competing" with the comprehensive universities. The funding allocation to the Board of Trustees is of a limited amount. The comprehensive universities must of necessity receive the larger amounts if they are to remain capable of carrying out their missions. Authorities advocate that they should receive more dollars per student. As long as the larger, comprehenisve universities are open to all qualified students, both black and white students gain.

G. Facilities

From 1964-65 to 1984-85, statewide full-time equivalent enrollment at the eight universities nearly doubled to a peak of approximately 45,000 students. (U.S. Exhibit 836(b).) Enrollment growth was accompanied by a substantial increase in campus space and plant investment. (U.S. Exhibit 835, page 27; U.S. Exhibit 836(e); U.S. Exhibit 836(1).) The state's response to the increase in enrollment over this twenty-year period was inconsistent in the early years in the sense that a disproportionate share of the funds allocated for faculty expansion was received by the historically white institutions. In more recent years, significant expenditures have been made to increase the physical facilities at the historically black institutions. Despite having only approximately 25% of the total system-wide enrollment, the his-

[4] *See The Clarion Ledger, Jackson Daily News*, August 21, 1987 Editorial.

torically black institutions received 39% of the state appropriations from 1970 through 1980 for new construction, and from 1981 through 1986 received 51% of such funds. (Board Exhibit 304, page 1; Board Exhibits 326-330; Board Exhibit 344.) During the period 1981 through 1986, the state building commission allocated over 30% of all major repair and renovation appropriations to the predominantly black institutions. (Board Exhibits 331-338.)

The expendituure of substantial funds by the State of Mississippi in response to the increasing student enrollment in the higher education system resulted in a significant expansion of campus facilities at each institution. Campus space may be measured either in terms of gross square feet or net assignable square fee. Gross square feet is an architect's term measuring the outline of the floors of a building and adding these to reach a total square footage. Net assignable square feet is a smaller number than gross square feet, representing the amount of space available for functional purposes and would exclude vestibules, halls, closets, etc. The total increases in campus gross square feet from 1960-61 to 1984-85 range from 682,000 gross square feet at Delta State University to almost 3.3 million gross square feet at Mississippi State University. During the first five years (1960-65), Alcorn State University, Jackson State University, and the University of Southern Mississippi achieved a growth rate of 100%. In the most recent five-year period (1980-85), additions to plant range from 0 to 5 percent, with the exception of Jackson State University, which achieved a growth rate of 21.5 percent. Overall, space on the eight university campuses expanded from 6.5 million gross square feet in 1960 to 18.2 million gross square feet today and replacement value (in constant dollars) increased from ap-

proximately $200,000,000.00 to over $920,000,000.00. (U.S. Exhibit 836.)

Perhaps the most useful indicator of facilities resources is the amount of functional or net square feet of space per full-time equivalent student. The University of Southern Mississippi, a historically white comprehensive institution, has the smallest amount of net square feet per full-time equivalent student. When all eight institutions are ranked, the historically black institutions rank second, third, and seventh in total square feet per full-time equivalent. (U.S. Exhibit 836(k).) From the way in which the eight Mississippi universities fall within the rankings, the court finds that there is no correlation between the amount of campus space and the historical racial designation of the institutions.

Over the past 25 years, the historically black institutions consistently had a higher increase than did the historically white institutions in gross square feet and net square feet added. The historically black institutions experienced increases in total space of 381% while the historically white institutions experienced increases of 150%. The historically black institutions increased by 76% in gross square feet per student while historically white institutions increased 26%.

The physical plant of the higher education institution is a basic tool to facilitate its educational programs. There is a close relationship between facilities and the development or expansion of academic programs. A recent publication by the Carnegie Foundation reported that 62% of the students surveyed stated that facilities were the most important factor in their interest in an institution. The particular mix of facilities found at a given institution defines its "character." Objectively, one might include such fac-

tors as the age and construction type and design of campus buildings, their condition, ease of access, extent of land holdings, ability to expand, and visual images in defining institutional character. The subjective factors include the opinions of the academic community and the media and the opinions of parents, alumni, and students.

The character of the historically black institutions in 1954 was acknowledged to be inferior or unequal to that of the historically white institutions at that time. The facilities at the historically black institutions in 1954 were deemed to be adequate for undergraduate education. In 1986, the character of Jackson State University changed to that of what would be expected at a research university with limited ability to conduct research at the graduate level. With respect to the present-day character of Alcorn State University and Mississippi Valley State University, the court finds facilities commensurate with institutions with an undergraduate mission.

Mr. Richard Dober of Cambridge, Massachusetts, a noted lecturer and author of over fifty books on campus planning and adviser to China on educational facilities, studied the physical facilities of the eight institutions in Mississippi. Mr. Dober testified he found no correlation between the racial identity of the institutions and the quality of the facilities at the institutions and the court so finds.

H. Governance

The Board of Trustees of the Institutions of Higher Learning

The Board of Trustees consists of thirteen members appointed by the governor, with the advice and consent of the Mississippi Senate. Twelve members are

appointed to twelve-year terms, in groups of four, every four years. Ten of the twelve members are to be appointed from and must be residents of the several designated districts (Congressional or Mississippi Supreme Court Districts), and two are to be appointed from the state at large. The thirteenth member is appointed "for the University of Mississippi . . . and shall have a vote only in matters pertaining to the University. . . ." This member, known as the Trustee for the LaBauve Fund, serves a four-year term.[5] (Miss. Const. Sec. 213-A (1890); U.S. Exhibit 1, page i; U.S. Exhibit 636, page 1). There are no stated written criteria for selection of board members. Those appointed to serve on the Board of Trustees have represented various professional backgrounds.

No black person was appointed to the Board of Trustees from 1932 through 1971. The first black person to serve on the Board of Trustees, Dr. Robert Walker Harrison, was appointed in 1972. Since that appointment, three additional blacks have been appointed and three blacks presently serve on the Board. Elected by the membership of the Board of Trustees, blacks have served as president and vice-president of the Board. Blacks have also served as chairmen of numerous Board committees. A close working relationship and strong sense of collegiality exist among white and black Board members.

The Board of Trustees selects an executive secretary who, *inter alia*, employs necessary professional

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[5] H.Con.Res. 19 (1987) (Miss.) (H01.H87R193.AHS) proposed to amend Section 213-A, Mississippi Constitution of 1890, by deleting the provision for the LaBauve Trustee. This proposal was ratified in the November, 1987 election thereby concluding the abolishment of this trustee position.

staff, subject to Board approval. (U.S. Exhibit 636, page 8.) The Board's first two black professional staff members were not employed until 1974. (U.S. Exhibit 936, page 36.) At present, the staff responsible for the day-to-day operations of the Board of Trustees consists of twenty-three persons, six of whom are black. Moreover, four of the six blacks on this staff are professionals. Apart from the maintenance staff, the other major staff segment employed by the Board of Trustees is responsible for overseeing the guaranteed student loan program. This group consists of approximately fifty persons, seventeen of whom are black.

III. Conclusions of Law

A. General

The private plaintiffs' claims are based upon the Thirteenth and Fourteenth Amendments, 42 U.S.C. § 1983, Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, *et seq.*, 34 C.F.R. Part 100 (administrative regulations effectuating Title VI), and 42 U.S.C. § 1981. *See Guardians Association v. Civil Service Commission*, 463 U.S. 582, 103 S.Ct. 3221, 77 L.Ed.2d 866 (1983) (private cause of action implied in Title VI). The claims of the United States[6] are based upon the Fourteenth Amendment and Sec-

[6] The Attorney General of the United States, upon receipt of a referral from the Department of Education, has the authority to sue on behalf of the United States to enforce statutory requirements and contractual assurances of nondiscrimination made pursuant to the operation of federally assisted programs administered by public institutions of higher education. Section 602 of Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d-1; *United States v. Marion County School District*, 625 F.2d 607, 611-13 (5th Cir.1980).

tions 601 and 602 of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000d and 2000d-1.[7]

The defendants do not dispute that Mississippi law forbade interracial education at the university level up to the time of the decision in *Meredith v. Fair*, 305 F.2d 343 (5th Cir.1962). Defendants' racially segregative policies at that time encompassed the areas of: (1) student enrollment, (2) maintenance of branch centers by the historically white universities in close proximity to the historically black universities, (3) employment of faculty and staff, (4) provision and condition of facilities, (5) allocation of financial resources, (6) academic program offerings, and (7) racial composition of the governing board and its staff. The fundamental issue before the court at this time, however, is whether the defendants are currently committing violations of the Thirteenth and Fourteenth Amendments, Title VI and 42 U.S.C.

[7] As recipients of federal financial assistance, the State of Mississippi and its agencies exercising management and control of the public colleges and universities are prohibited from discriminating against any individual on the basis of race, color or national origin. Section 601 of Title VI essentially prohibits discrimination which violates the Equal Protection Clause of the Fourteenth Amendment. *Regents of the University of California v. Bakke*, 438 U.S. 265, 281-87, 98 S.Ct. 2733, 2743-46, 57 L.Ed.2d 750 (opinion of Powell, J.); *id.* at 327, 98 S.Ct. at 2767 (opinion of Brennan, J.) (1978). Section 604 of the Civil Rights Act of 1964, 42 U.S.C. § 2000d-3, does not bar the United States from maintaining an action under Title VI that is, in part, aimed at eliminating the segregation of faculties at institutions of higher learning. *Caulfield v. Board of Education of the City of New York*, 632 F.2d 999, 1005 (2d Cir.1980); *United States v. Jefferson County Board of Education*, 372 F.2d 836, 883 (5th Cir.1966), *aff'd en banc*, 380 F.2d 385 (5th Cir.), *per curiam cert. denied*, 389 U.S. 840, 88 S.Ct. 67, 77, 19 L.Ed.2d 103, 104 (1967).

§ 1981. This case differs in an interesting way from the usual lawsuit. The usual complaint charges that certain facts exist at the time of filing suit and the evidence at trial is retrospective—that is, it looks back to events that allegedly occurred prior to the filing. In this case the issue is over what the facts are at the time the case is being tried, 12 years after the filing of the case.

At the very least, a state choosing to operate a system of public higher education has the duty to adopt and implement good faith, racially nondiscriminatory policies and practices. Black applicants must be admitted to public institutions of higher education "under the rules and regulations applicable to other qualified candidates." *Florida ex rel. Hawkins v. Board of Control*, 350 U.S. 413, 414, 76 S.Ct. 464, 465, 100 L.Ed 486 (1956); *Sweatt v. Painter*, 339 U.S. 629, 636, 70 S.Ct. 848, 851, 94 L.Ed. 1114 (1950); *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337, 352, 59 S.Ct. 232, 237, 83 L.Ed. 208 (1938). Where a state has previously maintained a racially dual system of public education established by law, it assumes an "affirmative duty" to reform those policies and practices which required or contributed to the separation of races. *Milliken v. Bradley*, 433 U.S. 267, 290, 97 S.Ct. 2749, 2762, 53 L.Ed.2d 745 (1977). *See also Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 15, 91 S.Ct. 1267, 28 L.Ed.2d 554 (1971). At the elementary and secondary education level the courts have defined the affirmative duty to include also the elimination of all "vestiges" or effects of the former *de jure* segregated system. *Green v. School Board of New Kent County*, 391 U.S. 430, 88 S.Ct. 1689, 20 L.Ed.2d 716 (1968).

The courts are unanimous in holding that the affirmative duty to dismantle a racially dual structure

in the elementary and secondary levels applies also in the higher education context. *See, e.g., Geier v. University of Tennessee*, 597 F.2d 1056 (6th Cir. 1979); *United States v. State of Alabama*, 628 F.Supp. 1137 (N.D.Ala.1985);[8] *Norris v. State Council of Higher Education*, 327 F.Supp. 1368 (E.D.Va.) (three-judge court), *aff'd, sub nom., Board of Visitors of the College of William & Mary v. Norris*, 404 U.S. 907, 92 S.Ct. 227, 30 L.Ed.2d 180 (1971); *Lee v. Macon County Board of Education*, 317 F.Supp. 103 (M.D.Ala.1970) (three-judge court), *aff'd in material part*, 453 F.2d 524 (5th Cir. 1971); *Alabama State Teachers Association (ASTA) v. Alabama Public School and College Authority*, 289 F.Supp. 784 (M.D.Ala.1968) (three-judge court), *aff'd*, 393 U.S. 400, 89 S.Ct. 681, 21 L.Ed.2d 631 (1969). There is, however, substantial disagreement on the question of whether the scope of the duty is as broad in the higher education context as has been defined and applied in the elementary and secondary education context.

Several courts, relying on the Supreme Court decision in *Green v. School Board of New Kent County*, 391 U.S. 430, 88 S.Ct. 1689, 20 L.Ed.2d 716 (1968), have concluded that some level of racial mixture at previously segregated institutions of higher learning is not only desirable but necessary to "effectively" desegregate the system. *See Geier v. Alexander*, 801 F.2d 799 (6th Cir.1986). Others, relying on the Fifth Circuit authority *Alabama State Teaches Association ("ASTA") v. Alabama Public School and College Authority*, 289 F.Supp. 784 (M.D.Ala.1968), maintain that a state's affirmative duty is satisfied

[8] Overruled by 11th Circuit, 828 F.2d 1532 (11th Cir.1987), but not on merits of case.

by the good faith adoption of race-neutral policies and procedures. *See Artis v. Board of Regents of the University System of Georgia*, No. CV479-251 (slip op.) (S.D.Ga. February 2, 1981) (unpublished).

Upon consideration of the pertinent case law the court is of the opinion that the more narrowly defined duty set forth in *ASTA* should control in this case. The Supreme Court in *Green* struck down a "freedom of choice" plan that was designed to desegregate elementary and secondary schools but which had failed to appreciably alter the racial identifiability of the schools. Focusing on the results of official actions rather than on the apparent presence or absence of good faith underlying such action, the Court required affirmative steps, including the establishment of mandatory attendance zones, "which promise realistically to convert promptly to a system without a 'white' school and a 'negro' school, but just schools." *Green*, 391 U.S. at 442, 88 S.Ct. at 1696. As is apparent from a contextual reading of *Green* and subsequent Supreme Court and lower court decisions considering the nature and extent of the state's duty to desegregate at the elementary and secondary level, the affirmative duty as delineated in these cases rests upon the traditional power vested in local school authorities to dictate attendance patterns in compulsory elementary and secondary school systems, that is, to order certain students to attend certain schools. The circumstances in the higher education field, however, are different.

In *ASTA*, plaintiffs challenged a proposed expansion of a historically white higher education institution located in close proximity to a historically black institution alleging that the state officials overseeing the proposed expansion failed to adequately consider

how the expansion could be carried out so as to maximize integration and the enhancement of facilities and programs found at the historically black school. 289 F.Supp. at 789. The court, however, rejected plaintiffs' arguments that school officials were under an obligation to choose policy alternatives which maximized the integration of component institutions. Based on what it perceived to be certain qualitative differences existing between elementary-secondary schools and institutions of higher learning, the court accordingly refused to adopt the proposition that the scope of the affirmative duty in higher education extended as far as in elementary and secondary education. *Id.* Instead, the *ASTA* court concluded that the affirmative duty to disestablish or "dismantle" a dual higher education system is fulfilled by the adoption and implementation of "good faith nondiscriminatory policies." *Id.* at 789-90. Writing for the three-judge court, Judge Frank M. Johnson stated:

> Higher education is neither free nor compulsory. Students choose which, if any, institution they will attend. In making that choice they face the full range of diversity in goals, facilities, equipment, course offerings, teacher training and salaries . . . . From where legislators sit, of course, the system must be viewed on a statewide basis. In deciding to open a new institution or build a branch or expand an existing institution, and in deciding where to locate it, the legislature must consider a very complicated pattern of demand for and availability of the above-listed variables, including, also, impact on the dual system. We conclude that in reviewing such a decision as to determine whether it maximized desegregation we would necessarily be involved,

> consciously or by default, in a wide range of educational policy decisions in which courts should not become involved.

ASTA, 289 F.Supp. 788. The court concluded by stating that:

> [A]s long as the State and a particular institution are dealing with admissions, faculty and staff in good faith the basic requirement of the affirmative duty to dismantle the dual system on the college level, to the extent that the system may be based on racial considerations, is satisfied.

Id. at 789-90. The Supreme Court affirmed by *per curiam* decision *ASTA*'s holding that good faith implementation of nondiscriminatory policies satisfies the state's affirmative duty to desegregate a higher education system. *ASTA*, 393 U.S. 400, 89 S.Ct. 681, 21 L.Ed.2d 631 (1969). *See also Lee v. Macon County Board of Education*, 453 F.2d 524, 527 (5th Cir.1971) (observing that the principles of public school desegregation have not been applied to institutions of higher learning in same manner as have been applied to elementary and secondary schools).

The *ASTA* court made a distinction between the state's duty in the higher education field as distinguished from the secondary and elementary education areas. This distinction was buttressed by the Supreme Court's recent decision in *Bazemore v. Friday*, 478 U.S. ——, 106 S.Ct. 3000, 92 L.Ed.2d 315 (1986). *Bazemore* in part involved a fourteenth amendment challenge of the North Carolina Extension Service 4-H and Homemaker Clubs which had been racially segregated by law prior to 1965. 106 S.Ct. at 3012. Even though the clubs continued to

exhibit marked racial imbalance, the Court found that the Extension Service had "disestablished segregation" by adopting a policy allowing all club members to freely choose which club they wished to join. 106 S.Ct. at 3013. The Court distinguished *Green*'s condemnation of "ineffective" freedom of choice plans in local public schools on the grounds that "while school boards customarily have the power to create school attendance areas and otherwise designate the school that particular students may attend, there is no statutory or regulatory authority to deny a young person the right to join any club he or she wishes to join." *Id.* Thus, *Bazemore* draws a clear distinction between elementary and secondary education systems and those systems where admissions are traditionally determined by voluntary choice. In the latter context, the affirmative duty to desegregate does not contemplate either restricting choice or the achievement of any degree of racial balance.

The court perceives no inconsistency with respect to the Supreme Court decisions *Green* and *Bazemore* and the *ASTA* decision. These decisions stand in harmony for the proposition that the scope of the affirmative duty to disestablish a former *de jure* segregated system of education is to be defined in accordance with the degree of choice individuals enjoy as to whether they wish to attend college at all and, if so, which one. Where "choice" is traditionally controlled by the state, in elementary and secondary education, the state is required to exercise its control in a way which maximizes the racial integration of component institutions. Although the continued racial identifiability of educational institutions per se is not violative of the Constitution of Title VI, *see Dayton Board of Education v. Brinkman*, 433 U.S.

406, 419-20, 97 S.Ct. 2766, 2775, 53 L.Ed.2d 851 (1977), the question of whether the state has fulfilled its affirmative duty in the elementary and secondary sphere is determined by assessing the results of state policy, that is, whether the policies implemented in fulfillment of the affirmative duty have substantially affected the racial mix of the schools involved. The overwhelming emphasis on the results of official policy in this context is appropriate since direct official control over attendance decisions can be expected to produce an immediate tangible impact on racial attendance patterns.

In the college and university education context, however, where individuals have traditionally enjoyed free choice as to whether and when to attend school, the courts have considered it inappropriate to require state officials to maximize integration when assessing affirmative action vis-a-vis the affirmative duty to disestablish a former *de jure* segregated system. The wisdom of this approach does not rest solely upon traditional notions, however. It also rests on the qualitative distinctions existing between the post-secondary and the elementary-secondary education systems. Elementary and secondary schools in a single district tend to be fungible in the sense that they generally strive towards uniformity in offerings, facilities and services. The opposite is true in higher education. A special emphasis is placed upon the relative uniqueness of the separate institutions comprising a public system of higher education. Indeed, the uniqueness of institutions which results from the confluence of course offerings, services, size, location, faculty and students found at each institution, explains why freedom of choice is so valued and why the courts have not required the restriction of student

choice in higher education. Thus, given that the state is not obligated to control student choice in fulfilling its duty to disestablish a former *de jure* segregated system of higher education, it would be inappropriate to emphasize the relative degree of integration of each institution in determining whether the state has satisfied its duty. While student enrollment and faculty and staff hiring patterns are to be examined, greater emphasis should instead be placed on current state higher education policies and practices in order to insure that such policies and practices are racially neutral, developed and implemented in good faith, and do not substantially contribute to the continued racial identifiability of individual institutions. *See Brinkman*, 433 U.S. at 413, 97 S.Ct. at 2772; *Milliken*, 418 U.S. at 744-45.

B. Student Admission, Recruitment and Retention

1. Use of the ACT Assessment

Should the Pre-Med Student Have Lower Entrance Requirements Than the Tight End?

The private plaintiffs and the United States claim that the defendants continue to deny students equal access to the system of higher education on the basis of race. This challenge centers principally on the use of the ACT test scores as a requirement for admission to each of the eight institutions. The plaintiffs argue that the evidence shows the Board of Trustees adopted and has continued to use the ACT testing requirement for the purpose of minimizing the numbers of black persons eligible to enroll in the system of higher education and segregating black persons within that system, in violation of the Fourteenth Amendment and Title VI, 42 U.S.C. § 2000d et seq. *See, e.g.*,

Washington v. Davis, 426 U.S. 229, 239-40, 242, 96 S.Ct. 2040, 2047-48, 2049, 48 L.Ed.2d 597 (1976).

Plaintiffs argue that the analytical factors delineated in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 266-68, 97 S.Ct. 555, 564-65, 50 L.Ed.2d 450 (1977), applied to the facts in the instant case, demonstrate the discriminatory intent on the part of the Board of Trustees with respect to both the adoption of the ACT requirement and its continued use. Plaintiffs contend that two of the *Arlington Heights* factors in particular—an evaluation of the historical background of the decision and the specific sequence of events leading up to the challenged decision—support the conclusion that the ACT standard was originally adopted by the Board of Trustees in 1962 after James Meredith had applied for admission to the University of Mississippi, in order to minimize the desegregation of the historically white institutions. As support for their contention that the continued use of the ACT requirement is motivated by discriminatory intent, plaintiffs note "that the [standard] bears more heavily on one race than another." *Washington v. Davis*, 426 U.S. at 242, 96 S.Ct. at 2049. Further, it is contended that the employment of differing ACT requirements at each of the various institutions in effect channels those black persons eligible for admission to historically black institutions, thereby perpetuating the racial status quo. It is also argued that the use of the ACT minimum score requirement is marked by "substantial departures," *Arlington Heights*, 429 U.S. at 267, 97 S.Ct. at 564, in the sense that the Board of Trustees has used the ACT test scores in a manner inconsistent with the policies of the American College Testing Program, which recommends the consideration of high school grades in conjunction with the

ACT test scores in making admission decisions, with the effect of reducing the numbers of blacks who might otherwise be eligible for admission if grades were included.

We start with the proposition that no educational requirement is permissible if adopted and maintained for a discriminatory purpose. *See Arlington Heights*, 429 U.S. at 256, 97 S.Ct. at 559; *Washington v. Davis*, 426 U.S. 238, 96 S.Ct. at 2046. While the circumstances surrounding the Board of Trustees' adoption of the ACT assessment in 1962 lead this court to find that the ACT assessment was in fact adopted ". . . because of, not merely in spite of its adverse effects upon an identifiable group," *Personnel Administrator v. Feeny*, 442 U.S. 256, 279, 99 S.Ct. 2282, 2296, 60 L.Ed.2d 870 (1979), much time has passed since 1962 and much has transpired with respect to the Board of Trustees' student admissions policies. First, it should be noted that the Board of Trustees did not adopt specific ACT test score minimums for the institutions of higher learning in 1962. It was not until May of 1976, effective the Fall of 1977, that the Board of Trustees established minimum ACT scores for college admission. The policy stipulated that no student was to be admitted to any institution as a first-time freshman who failed to achieve an ACT score of 9. The policy at that time also provided that those institutions presently requiring higher minimum ACT scores were to continue those requirements. The circumstances surrounding the adoption of this minimum ACT test score in 1976, however, do not indicate that this policy was adopted for discriminatory purposes. It is apparent to the court that legitimate questions were raised at that time with respect to the level of scholastic preparation of entering freshmen.

The court also finds that the Board appropriately justified its varying ACT minimum test score requirements within the university system by acknowledging the potentially deleterious impact upon institutional enrollments, particularly at the three historically black institutions, if a uniform score were adopted. It was clear that setting an ACT minimum score of 15 for the historically black institutions would decimate existing student enrollments. Although conceding that an ACT score of 9 was a shockingly low level of achievement for university-bound students, the Board of Trustees recognized that the realities of the student body composition at that time required that a low score be utilized at those universities. During the past several years, the gap which had existed between the historically white and the historically black institutions as to ACT minimum scores has narrowed considerably.

The court also finds adequate justification for the Board of Trustees' decision not to adopt high school grades as a component of the admission requirements. Evidence was presented at trial which indicated that the Board of Trustees was, and continues to be, concerned about grade inflation and the lack of comparability in grading practices and course offerings among Mississippi's diverse high schools. Furthermore, the ACT organization advised the Board of Trustees in 1976 that although inclusion of grades with ACT test scores was a sound indicator of both level of preparation and likelihood of success at the freshman level in college, the use of the ACT test score alone was also a valid indicator. ACT's position remains unchanged.

There have been a number of other revisions of the admission requirements which, given the circumstances existing during such times, indicate that the Board of Trustees was in fact responding to legitimate educational and fiscal concerns and not to the relative racial mix at the historically white institutions. Most recently, and consistent with a concern regarding the academic readiness of entering freshmen, the Board of Trustees in July, 1982 adopted high school course requirements for implementation in the Fall of 1986. There is strong evidence that the adoption of the core curriculum requirement has in fact raised the level of academic preparation of entering freshmen as measured by an improvement on the ACT test scores of those students completing the core curriculum requirements.

The court finds that the current admission policies and procedures, including the particular use to which the ACT assessment is put, were not adopted for racially discriminatory purposes and are reasonable, educationally sound, and racially neutral. There can be no doubt that the ACT test score is a reliable instrument frequently used as an integral component of college admission standards. As previously noted, every state in the United States has at least one institution making use of the ACT data and it is the predominant admission test in some 28 states. In addition to providing a highly relevant status report on student school achievement, the ACT, as a standardized instrument, enables Mississippi educators to assess uniformly the level of academic preparation of students graduating from high schools across the state. In addition, the positive correlation between performance on the ACT and academic achievement during the freshman year at Mississippi universities is well established.

While average ACT scores do differ among Mississippi black students as contrasted with Mississippi

white students, the Board-established minimum ACT scores are extremely modest levels of required performance. Nationally, 95% of all ACT tested students score 9 or above and over 70% of all students score 15 or above. Nine out of every ten ACT tested students in Mississippi, including 80% of all black students, score 9 or above on the ACT; and students who achieve a 9 on the ACT English and social studies tests are only reading at a ninth grade level. Indeed, the Board of Trustees' admission standards are even more modest than the recently adopted NCAA Proposition 48 which requires achievement of specified ACT composite scores in order for student athletes to be eligible to participate in athletics. Beginning in August, 1988, all student athletes must achieve an ACT composite score of 15 and at least a 2.0 grade point average on a 4.0 scale. Unlike the Board's standards, there are no exceptions to this 15 requirement and, further, the Board does not require students to achieve the 2.0 grade point average. The court is of the opinion that it would be regressive to order the universities of this state adopt an admissions policy in which entering pre-med and pre-law students have lower admission requirements than a physical education student who is on scholarship to play tight end.

In the absence of a showing of intentional discrimination, the standards under the Fourteenth Amendment and Title VI do not require the state to modify or lower valid admission or other educational standards even if those standards have a disparate impact on minority or other-race students and even if there exist other reasonable alternatives with less disparate impact. As the Fifth Circuit Court of Appeals has held in *LULAC v. Texas*, 793 F.2d 636, 649 (5th Cir. 1986), a case involving an attack on admission stand-

ards for a teacher education program in a formerly segregated higher education system, "even a state that formerly practiced de jure segregation is not required by the [Equal Education Opportunity] Act to suspend or lower valid academic standards." Similarly, a Title VI violation is established either under the standard "disparate impact" analysis or the affirmative duty outlined above, "only if the challenged test is not a reasonable measure of a bona fide educational requirement." *Id.* The rationale for this rule is simple. "If the [challenged educational standard] is valid, enjoining its use would not, in any meaningful way, counteract the effects of past segregation, but might simply serve to perpetuate a dual standard," *id.*, by reinforcing the stereotype that minority students cannot satisfy generally applicable educational standards and by diluting educational benefits offered to all students, black and white. Indeed, if valid academic standards were lowered to eliminate a disparate impact, this would simply serve to lock in, not correct, any educational deficiencies suffered by black children in elementary and secondary schools, by "celebrating and perpetuating the hollow certification that accompanied black graduation pre-*Brown v. Board of Education*," *Deborah P. v. Turlington*, 654 F.2d 1079, 1085 (5th Cir.1981) (Tjoflat, J., dissenting from denial of rehearing en banc).

If Title VI is construed to prohibit the establishment of reasonable academic standards simply because they tend to reinforce the racial identifiability of previously segregated colleges, it might well be argued that formerly black schools are obliged to raise academic standards if this reduces black participation or increases white representation. No such rule, however, can be derived from the Constitution

or Title VI. In addition, the Supreme Court has consistently emphasized that courts "are particularly ill-equipped to evaluate [academic decisions]" and that this consideration "warn[s] against any such judicial intrusion into academic decision-making." *Board of Curators of the University of Missouri v. Horowitz*, 435 U.S. 78, 92, 98 S.Ct. 948, 956, 55 L.Ed.2d 124 (1978).

As to plaintiffs' argument that current admission policies in effect "channel" black students to the historically black universities, the only pertinent data presented at trial revealed that the utilization of the ACT composite score of 15 as a requirement for admission at the historically white institutions and the use of an ACT composite score of 13 at the historically black institutions do not substantially contribute to the continued racial identifiability of Mississippi universities. The historically black institutions are not predominantly black because black students who first preferred to attend a historically white institution were "channeled" to black institutions after failing to achieve a test score of 15. As previously pointed out, practically all the black students who applied to predominantly white universities in the Fall of 1986 were accepted.

Finally, private plaintiffs also suggest that the current admission standards perpetuate the prior intentional discrimination at the elementary and secondary school levels. Plaintiffs cite *Geier v. Alexander*, 801 F.2d 799 (6th Cir.1986) for the proposition that the Board of Trustees must "compensate" for unequal educational opportunities at lower educational levels. Although *Geier* alluded that a district court's consideration of conditions in public elementary and secondary school systems was appropriate in fashioning

a remedial plan, that is a far cry from establishing a *duty* to consider the conditions found at the elementary and secondary levels. Further, the Fifth Circuit's holding in *LULAC* is clear that higher education systems are under no legal obligation to "compensate" or "remedy" constitutional infirmities existing at the elementary and secondary school levels. *LULAC*, 793 F.2d at 647.

Given the foregoing, the court finds that current Board admission policies in force among the institutions of higher learning, including the use of the ACT test scores in conjunction with the core curriculum requirement, are inherently reasonable and educationally sound after giving due consideration to the discriminatory taint attached to ACT requirements by the Board of Trustees' initial adoption of the ACT assessment in 1962.

2. Student Recruitment and Retention

The defendants have for a number of years made well known their desire to attract and recruit minority race students at each institution, especially the historically white institutions. Each institution implements various techniques in accomplishing this objective. For example, universities employ other-race recruiters charged with specific responsibility for recruiting other-race students. Multi-racial recruiting teams are frequently used. In addition, recruitment brochures and other university publications highlight a commitment toward other-race participation. Indeed, with respect to the universities' recruitment initiatives at high schools and junior colleges, the Board of Trustees has prohibited recruitment at schools which fail to execute an agreement allowing multi-racial recruiting teams. The evidence also

shows that other-race students who choose to attend any of the eight Mississippi institutions enjoy desegregated campus environments.

The above practices are reasonable and affirmative efforts by the defendants with respect to the recruitment of other-race students at each institution. Although recruitment of minority students is a competitive business, every institution within the system seems to strive for increased enrollment of students of all races. Such competition was understandably affected each institution's ability to attract other-race students. We find, in any event, that other-race recruitment efforts have been successful and evince the defendant's commitment to the maintenance of a state-wide system which not only speaks of a nondiscriminatory policy and practice but also affirmatively encourages minority participation in the system. The statistics presented at trial also demonstrate success in that the actual representation of blacks in the freshman classes at Delta State University, Mississippi State University, Mississippi University for Women, and the University of Southern Mississippi is in statistical parity with the representation of blacks in the qualified pools. The proof shows that qualified blacks and qualified whites are equally likely to apply, be accepted, and enroll at these universities. While the University of Mississippi is absent from this list, there is no evidence to suggest that the lack of black student applications to the University of Mississippi is due in any way to official discriminatory polices or practices.

Pursuant to the terms set forth in the 1974 Plan of Compliance, defendants have expended considerable efforts toward improving the retention rate of minority students by developing and implementing

developmental studies programs at each institution. We find that the rather substantial success of the programs underscores the good faith effort undertaken by the defendants with respect to the recruitment of minority students.

3. Admissions Policies

Conclusion

In summary, the court finds that the current admission policies and procedures in effect among the Mississippi institutions of higher learning were adopted and developed in good faith and for nondiscriminatory purposes. The defendants' good faith is well illustrated by the affirmative efforts undertaken by the institutions of higher learning towards the attraction and recruitment of other-race students at each institution. Although the various institutions continue to be identifiable by the racial makeup of the student populations, this is not a substantial result of current admission practices and procedures but is instead the result of a free and unfettered choice on the part of individual students. Further, the court finds that the defendants have used every reasonable means at their disposal in their recruitment efforts. Defendants' efforts with respect to other-race student recruitment and retention satisfy their affirmative duty to dismantle the former segregated system insofar as the duty pertains to student enrollment.

C. The Assignment of Missions and the Allocation of Programs, Funding and Facilities

The private plaintiffs and the United States challenge the assignment of missions in 1981 and the current allocation of programs, funding and facili-

ties which flows from the mission designations. The plaintiffs' attack on the policies follows two relatively distinct arguments. First, plaintiffs argue that the affirmative duty to disestablish a former *de jure* segregated system of higher education should be defined and applied in a way so as to ensure both equal access to the system and the substantial integration of all component institutions. Equal access to the system is provided by the elimination of racially discriminating policies and the implementation of race-neutral student admission and faculty and staff hiring policies and procedures. With respect to integration, while implicitly acknowledging that *Bazemore* and *ASTA* speak against the state being under an obligation to directly influence student attendance choices by implementing, for example, quotas or attendance zones, plaintiffs argue that the state must seek to maximize the racial integration of component institutions through the modification and manipulation of policies in areas which indirectly affect and condition student attendance choices, especially policies in the areas of programs, facilities and funding. It is argued that the modification of existing policy in these areas by increasing the level, number and type of programs and facilities found at the historically black institutions would serve to entice greater numbers of white students to attend the historically black schools. For example, it is argued that the offering of one or more popular Ph.D programs at a black institution, that are not available at a white institution, would attract more white students to the black institution.

Regardless of the context, the affirmative duty to disestablish a former *de jure* system is to be defined in unyielding terms to ensure that all student admission and faculty and staff hiring policies and procedures operate on a racially neutral basis. And although the affirmative duty has been defined to include also an interest in fostering the racial integration of educational institutions once segregated by law, the lengths to which the state must go to integrate its institutions vary according to the degree of control the state possesses over attendance patterns and according to the nature and extent of any interests which may serve to counterbalance the interest in integration. Thus, for example, in *Green*, the Supreme Court placed upon the defendants the obligation to adopt mandatory attendance zones in an effort to force some degree of integration in formerly segregated elementary schools. In *ASTA*, on the other hand, the court declined to require the defendants to use the proposed expansion of university level educational offerings as an opportunity to enhance a local historically black institution so as to enable the black school to attract greater numbers of white students. The court based its decision upon a recognition of the many interests and factors which confront decision-makers at the higher education level and which serve to counterbalance the desire to integrate each institution. *ASTA*, 289 F.Supp. at 788. "From where legislators sit, of course, the system must be viewed on a statewide basis. In deciding to open a new institution or build a branch or expand an existing institution . . . the legislature must consider a very complicated pattern of demand for and availability of [such variables as institutional goals, facilities, equipment and course offerings] including, also, the impact on the dual system." *Id.* The *ASTA* court therefore concluded that the Constitution does not require school officials to pursue policy alternatives which happen to offer the greatest integrative

potential at the expense of legitimate racially neutral policies. This court agrees with the holding and the underlying rationale set forth in *ASTA*.

Plaintiffs also argue that the differentiation which exists among the component institutions in the areas of mission, facilities, equipment and funding are disparities causally related to the former *de jure* system since in these areas "normal administrative practices should produce schools of like quality, facilities and staffs." *Swann*, 402 U.S. at 18-19, 91 S.Ct. at 1277. It is therefore argued that the assignment of missions, which is claimed to have favored the historically white institutions at the expense of the historically black institutions, and defendants' allocation of educational resources among the institutions commensurate with the mission designations constitute a denial of equal educational opportunity to the students choosing to attend the historically black institutions. It is further argued that given these continuing disparities between the historically black and the historically white institutions "the victims of discriminating conduct [have not been restored] to the position they would have occupied in the absence of such conduct." *Milliken v. Bradley*, 433 U.S. at 280, 97 S.Ct. at 2757. Plaintiffs accordingly contend that the defendants' duty to disestablish the former *de jure* system has not been satisfied until the disparities in programs, facilities, equipment, and financing have been eliminated through the enhancement of the historically black institutions and their equalization with the historically white institutions.

Preliminarily, the court notes that the plaintiffs' argument as set out above comes dangerously close to suggesting that institutions are accorded rights under the equal protection clause. There should be no

doubt, however, that the equal protection clause has no application to acts of the state taken with respect to its own political subdivisions and agencies. *Williams v. Mayor and City Council of Baltimore*, 289 U.S. 36, 40, 53 S.Ct. 431, 432, 77 L.Ed. 1015 (1933); *Trenton v. New Jersey*, 262 U.S. 182, 187, 191, 43 S.Ct. 534, 538, 67 L.Ed. 937 (1923); *County Department of Public Welfare v. Stanton*, 545 F.Supp. 239, 242 (N.D.Ill.1982). Such entities, as creations of the state, simply have no privileges and immunities against the state and are incapable of experiencing injury under the equal protection or due process clauses of the Fourteenth Amendment. *See Triplett v. Tiemann*, 302 F.Supp. 1239, 1242-43 (D.Neb. 1969).

As the court has previously observed, a system of higher education, comprised of a number of separate institutions serving different goals and fulfilling various needs and governed by a common authority, is inherently different from elementary and secondary school systems, which are not marked by diversity but rather are characterized by uniformity. The court therefore does not find as persuasive those authorities relied upon by the plaintiffs in support of their argument that were it not for the former *de jure* system one would have expected and found institutions of substantially the same type, number, and level of program offerings, mission and facilities. To be sure, in reviewing the evidence offered in this case, the court has found a number of differences existing among and between the institutions of higher learning. The court cannot state, however, that such differences are "disparities" reminiscent of the former *de jure* system. Instead, such differences in programs, mission, facilities and funding are usually

found, and are to be expected, within a system of higher education which includes eight institutions throughout the state. Surely it cannot be soundly argued that the state should allocate equal monies to each institution. Such a practice would foster mediocrity or worse. It appears to the court that the very limited higher education dollars are too widely dispersed among too many institutions already. As long as qualified students, black and white, can attend the type and quality of available institutions they choose, there is no denial of equal protection. The court will address particular areas of concern in the sections which follow.

1. The Assignment of Missions

Plaintiffs argue that the way in which the defendants allocated missions in 1981 in essence freezes in the effects of past discrimination since the three major historically white institutions were the only institutions to receive a comprehensive designation, thus ensuring their continued receipt of the greater share of the available educational resources. Plaintiffs impliedly suggest, too, that the defendants' designation of missions, relegating the three historically black institutions to relatively inferior status by classifying these institutions as either "urban" or "regional," was racially motivated. Plaintiffs conclude by stating that the affirmative duty requires that the current mission classifications be disregarded and that the historically black institutions' academic programs be enhanced in an effort to equalize offerings vis-a-vis the historically white institutions.

The court finds plaintiffs' argument to be unpersuasive. Plaintiffs' argument if accepted could lead the court to conclude that they want to continue the

existence of predominantly black and predominantly white colleges but continue them on an equal quality basis with each other. Ignoring the *Plessy v. Ferguson* doctrinal overtones to plaintiffs' argument, the court finds that the defendants' designation of missions in 1981 was not motivated by a discriminatory purpose but was instead necessitated and justified by a need to conserve scarce educational resources. It is obvious that the allocation of missions based on the then existing programs, facilities and other educational resources found at each institution would best serve the goal of resource conservation. Just as in *ASTA*, the defendants in the instant case were and are under no constitutional duty to utilize the opportunity presented by their decision to define and delimit institutions by mission as a way to maximize the racial integration of component institutions. Furthermore, in view of the fact that the system of higher education and each of the member institutions are accessible to graduating high school students on racially neutral grounds, it cannot be seriously contended that the designation of missions discriminatorily impacts on students enrolled in the urban or regional institutions. The court therefore finds that the current mission designations are rationally based on sound educational policies and are not violative of the equal protection clause.

2. Unnecessary Program Duplication

During the trial, plaintiffs attempted to demonstrate that a substantial degree of unnecessary program duplication continues to exist within the system of higher education in Mississippi despite the recent inroads made by the Board of Trustees in lessening the amount of duplication. Apparently, this evidence

was intended to produce a logical inference that the level of unnecessary program duplication existing between historically black institutions and the historically white institutions has a negative effect on white student choice to attend the historically black institutions. The plaintiffs accordingly contend that the defendants are required to eliminate existing program duplication in a way that would enhance the program offerings of the historically black institutions, that is, eliminating the unnecessarily duplicative programs from the curriculum of the historically white institutions.

As detailed above, however, the defendants are under no duty to undertake efforts to enhance the historically black institutions without regard to the various other competing interests which influence policy choices in the higher education area, primarily money. Furthermore, there is no proof that unnecessary program duplication is directly associated with the racial identifiability of institutions. In addition, there is no proof that the elimination of unnecessary program duplication would be justifiable from an educational standpoint or that its elimination would have a substantial effect on student choice. Indeed, the experience of other courts assessing the relative impact of the elimination of unnecessary programs between historically white and historically black institutions indicates that the elimination of such programs would have little impact. *See, e.g., Artis*, slip op. at 4. In any event, there is no showing in this case that the elimination of unnecessary programs within the system of higher education in Mississippi would be feasible, educationally reasonable, or would offer any hope of substantial impact on student choice. The court therefore finds that the continued existence

of unnecessary program duplication within the system of higher education does not constitute a violation of defendants' affirmative duty.

3. Facilities

The court does not perceive a racially discriminatory pattern existing with respect to the allocation and condition of facilities when measuring facility resources by the amount of net square feet per full-time equivalent student. The historically black institutions have over the past 15 years received a higher proportionate share of state appropriations for capital improvements. While having only approximately 25% of the total enrollment, the historically black institutions received 39% of state appropriations from 1970 through 1980 for new construction; and from 1981 through 1986 they have received 51% of such funds. The distribution of funds for capital improvements clearly evinces a good faith affirmative effort on the part of the defendants to provide adequate facilities at the historically black institutions in accordance with their defined mission. While there is a need for repair of facilities at the historically black institutions, the court finds the same need exists across all institutions. We thus perceive no racial pattern with respect to the condition of facilities.

4. Financing

Plaintiffs also advance the argument that the defendants have failed to equitably allocate financial resources at the historically black institutions. It is argued that if one examines the issue of financial allocations by grouping the historically white institutions and the historically black institutions, one clearly finds allocations which favor the historically white institutions.

Plaintiffs' analysis disregards the allocation and definition of missions. It also ignores the relationship between the number and level of programs and the funding necessary to carry out those programs. If one follows mission precepts, no racial correlation can be inferred from an analysis of financial allocations to institutions on a per full-time equivalent student basis. Higher total per full-time equivalent student revenues and expenditures are found to differ between the comprehensive and noncomprehensive institutions; but this is true between white comprehensive and noncomprehensive institutions as well as black noncomprehensive institutions. Such differences are not indicative of educationally unreasonable or inequitable treatment of the historically black institutions. The educational expectation is that institutions with greater program breadth and research emphasis and greater emphasis on technical programs will reflect the higher per student total revenues and expenditures. Thus, while differences in level of funding obviously exist, these differences are not accountable in terms of race but rather are explained by legitimate educational distinctions among institutions. The court finds influential the question posed by the defendants. If from the total funding allocated by the legislature, funds that had been allocated to a comprehensive university were taken by the Board and transferred to a black noncomprehensive university, thereby decreasing the availability or quality of a program or programs at the comprehensive university, what would be the effect on the black students attending the comprehensive university? Approximately 30% of all black college students attending four-year colleges in the state attend one of the comprehensive universities. To follow the plaintiffs' argument to its ultimate conclusion would decrease the quality of the programs available to that 30% of the state's black students.

5. Land Grant Activities

Plaintiffs also argue for increased funding and resource allocation to the Alcorn State University's land grant programs. Plaintiffs point out that the land grant programs offered at Mississippi State University are vastly superior to those afforded students in the land grant programs at Alcorn State University. Plaintiffs contend that the factors which mark the Mississippi State University program as superior, for example, the greater breadth of course offerings and research opportunities, are the product of years of discrimination. It is also argued that additional resources for Alcorn State University would increase other-race presence at Alcorn and black participation in land grant activities.

Insofar as plaintiffs' argument can be construed as suggesting that Alcorn State University has standing to challenge the way in which the state has historically and at present allocates its educational resources among the institutions of higher learning, the court, as detailed above, finds that Alcorn State University is incapable of raising a legally cognizable challenge to such allocations. *See Williams v. Mayor and City Council of Baltimore*, 289 U.S. at 40, 53 S.Ct. at 432. To the extent plaintiffs' contentions are made on behalf of the students and faculty of Alcorn State University, we find that black citizens have equal access to the remaining institutions of higher learning, including Mississippi State University, and that therefore plaintiffs have failed to make a showing that educational opportunity in the land grant area is in

any way restricted. As the court has previously found, the defendants have allocated funds for land grant instruction in accordance with a racially neutral and an educationally sound funding formula. Further, the differentiations made by the defendants with respect to the nature of the land grant programs offered at the two land grant schools are educationally sound and are not motivated by discriminatory motive. Finally, the affirmative duty as defined by this court does not require the defendants to manipulate institutional missions, program offerings and facilities in an effort to maximize the racial integration of component institutions. Accordingly, the court finds plaintiffs' contentions to be without merit.

D. Faculty and Staff Employment

The private plaintiffs and the United States contend that a review of historical and current patterns of employment of faculty and administrators, by race, reveals that this pattern, alone, continues to designate universities as intended for black or white students in accord with the institutions' historical racial designation. It is argued that because the defendants' former *de jure* system also encompassed faculty and staff employment, as well as the Board of Trustees staff employment, the affirmative duty to dismantle the former segregated system extends as well to this area. Further, plaintiffs point to alleged specific instances of discriminatory conduct directed towards black faculty and staff at several of the historically white institutions. It is argued that this evidence of intentional discrimination establishes a violation of the Fourteenth Amendment and 42 U.S.C. § 1981.

The evidence shows, however, that the defendants have adopted racially neutral hiring policies with re-

spect to faculty and all staff at each of the institutions of higher learning, including the Board's own staff. Consistent with the defendants' stated objective of increasing employment of other-race faculty, the predominantly white institutions expend substantial affirmative efforts each year in attempting to attract and employ other-race faculty. There is an acute shortage of qualified black faculty applicants throughout the United States, and practically all universities are competing for a limited number of black teachers. Despite the acute shortage of supply of qualified minority faculty existing nationwide, the defendants' affirmative action policies have borne considerable fruit. Since 1974, the percentage of blacks hired exceeds the black representation in the qualified labor pool. Moreover, even though the turnover rate for black faculty is higher than it is for whites due to the high demand for black faculty existing nationwide, the present representation of blacks among the faculty at each of the five predominantly white institutions is statistically in line with the relevant labor market for faculty employed since 1974.

The court is not aware of any additional minority faculty and staff recruitment procedures the defendants could implement which would assure greater minority faculty and staff representation at the predominantly white institutions and minority staff representation within the Board of Trustees' own organization. The court, therefore, finds that the defendants' stated policy of nondiscrimination and affirmative commitment to the employment of other-race faculty and staff at every institution within the system, and the efforts undertaken pursuant to the stated policy, serve to fulfill their affirmative duty to dismantle the former segregated system as it pertains to faculty and staff employment.

IV. Conclusion

From the many days of testimony and the thousands of pages of exhibits received by the court during this trial, it is very easy indeed to become concerned with the inefficiencies and wastefulness of the higher education system in the state which came out so clearly from the evidence; but the issues of this case are not about the inefficiency for example of having two state universities only 20 miles apart in the eastern part of the state with separate administrations and duplicating programs, and two state universities on the western side of the state only 50 miles apart, each with separate administrations and duplicating programs. The issues are not about the economic efficiency of funding traditionally black and traditionally white universities which duplicate as many as 75% of each other's baccalaureate programs. Nor do the issues in the case deal with the wisdom of maintaining a system which required in the hard economic times of 1981-86 the first university of the state, the University of Mississippi, to drop more programs than was required of a smaller, noncomprehensive university; nor do the issues deal with the attempt by the state to maintain three comprehensive universities which compete with each other for the financial resources available, when larger surrounding states with larger higher education budgets maintain only one premier comprehensive university per state.

What the issues of this case are about are the Constitution and the laws of the United States as they apply to the offering of higher education by the State of Mississippi to its citizens and whether any practices or policies of the State in the higher education field are racially motivated to bring about results which deprive black citizens of benefits provided to white citizens.

In summary, the court finds that current actions on the part of the defendants demonstrate conclusively that the defendants are fulfilling their affirmative duty to disestablish the former *de jure* segregated system of higher education. The defendants have adopted race-neutral policies and procedures in the areas of student admission and recruitment and in the areas of faculty and staff hiring and resource allocation. The defendants have also undertaken substantial affirmative efforts in the areas of other-race student and faculty-staff recruitment and funding and facility allocation. It is obvious from the testimony presented that the defendants undertake to fund more institutions of higher learning than are justified by the amount of financial resources available to the state, but that is a policy decision of the legislature that affects the quality of the institutions among which the monies must be so thinly divided. Such a decision by the legislature goes to the quality of the institutions and not to the constitutionality of the funding. The differentiations made by the defendants with respect to each of the individual institutions in the designation of institutional missions are reasonable and were not motivated by discriminatory purpose. The court finds no proof in this record of current violation of the Constitution or Statutes of the United States by the defendants. This case should therefore be dismissed.

Let an order issue accordingly.

APPENDIX D

Constitutional and Statutory Provisions Involved

The Equal Protection Clause of the Fourteenth Amendment provides:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. Amend. XIV, § 1.

Section 601 of Title VI of the Civil Rights Act of 1964 provides:

> No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

42 U.S.C. 2000d.

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